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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. ~~6363~~ 18

CHARLES McLAURIN,

Petitioner,

—v.—

WILLIAM C. BURNLEY, JR., Custodian of the Greenville City Jail,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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CHARLES McLAURIN,

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—v.—

WILLIAM C. BURNLEY, JR., Custodian of the Greenville City Jail,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered October 15, 1968.

Opinions Below

The opinion of the United States District Court for the Northern District of Mississippi denying petitioner's application for a writ of habeas corpus is reported at 279 F. Supp. 220 (N. D. Miss. 1967) and is set forth in the Appendix, pp. 4a-15a, *infra*. The *per curiam* opinion of the United States Court of Appeals for the Fifth Circuit, affirming on the District Court's opinion, is unreported and is set forth in the Appendix, p. 1a, *infra*.

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The opinion of the Supreme Court of Mississippi affirming petitioner's conviction on direct appeal is reported at —— Miss. ——, 187 So. 2d 854 (1966) and is set forth in the Appendix, pp. 16a-28a, *infra*.

Jurisdiction

The judgment of the United States Court of Appeals for the Fifth Circuit was entered October 15, 1968 (R. 269; App., pp. 2a-3a, *infra*).

Jurisdiction of this Court is invoked pursuant to 28 U. S. C. §1254(1) to review the Court of Appeals' affirmance of a district court order denying a petition for writ of habeas corpus brought pursuant to 28 U. S. C. §2241 (c)(3).

Question Presented

Is the Mississippi breach of the peace statute, Miss. Code Ann. §2089.5 (1966 Supp.), unconstitutional on its face or as applied to convict petitioner for his conduct in making a public speech?

Constitutional and Statutory Provisions Involved

This case involves the First Amendment and Section 1 of the Fourteenth Amendment to the Constitution of the United States.

This case also involves the following statute of the State of Mississippi:

> Miss. Code Ann. §2089.5 (Supp. 1966)—Disturbance of the public peace, or the peace of others.

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1. Any person who disturbs the public peace, or the peace of others, by violent, or loud, or insulting, or profane, or indecent, or offensive, or boisterous conduct or language, or by intimidation, or seeking to intimidate any other person or persons, or by conduct either calculated to provoke a breach of the peace, or by conduct which may lead to a breach of the peace, or by any other act, shall be guilty of a misdemeanor, and upon conviction thereof, shall be punished by a fine of not more than five hundred dollars ($500.00), or by imprisonment in the county jail not more than six (6) months, or both.

Statement

Petitioner Charles McLaurin seeks review of his conviction and sentence of six months' imprisonment by the State of Mississippi for a speech he made in 1963 while a young Negro civil rights worker in Greenville, Mississippi.

On July 1, 1963, petitioner attended the trial of two Negro girls in the Police Court of the City of Greenville. The girls stood charged with disorderly conduct because they had refused to leave a traditionally segregated public park when the police, fearing violence from a crowd of white persons, ordered them to do so. The trial was attended by approximately 300 persons, about half of them Negroes (R. 37). During the trial, petitioner attempted to sit on the side of the courtroom customarily reserved for whites, but he was ordered out of that section (R. 37, 44-46, 48-50, 104-05). He left the courtroom and protested the segregated seating pattern to Police Chief William C. Burnley, Jr., respondent herein (R. 84-85, 105).

His protest was futile, and he was denied readmission to the courtroom (R. 105). Petitioner then left the municipal building, which housed the municipal court and the police station, and stood outside on the sidewalk waiting for the trial to end (R. 106). About 50 Negroes were standing outside the building, having been denied admission to the courtroom because the Negro side was completely filled (although there was some space on the white side) (R. 106).

The girls were convicted by the municipal court.[1]

As the spectators left the municipal building, petitioner began to address them.

A. *Testimony as to the Content of Petitioner's Speech.*

What petitioner said was the subject of testimony by three Greenville police officers and petitioner.

Arresting Officer Willie Carson testified:

> McLaurin began to talk protesting the Court's decision in words like, what are you going to do about it; you going to take this; it ain't right . . . (R. 39).
>
> • • • • •
>
> He said it was wrong—segregation was wrong—what we going to do about it. Mostly, he was protesting the Judge's decision (R. 42).
>
> • • • • •
>
> He was on the outside—I said, preaching because my experience in the words he was using and waving and

[1] In 1965, their convictions were reversed by the Mississippi Supreme Court. *Bolton* v. *City of Greenville*, 253 Miss. 656, 178 So. 2d 667 (1965), and *Bynum* v. *City of Greenville*, 253 Miss. 667, 178 So. 2d 672 (1965).

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shouting I said, I told him he couldn't preach out on the streets (R. 52).

• • • • •

. . . [H]e said this, what you going to do about this; this is wrong, the white Caucasian, this law is wrong; you going to take it; you going to let them get away with it. I heard those words there, and then the people began to just come in.

Q. Now, was the defendant cursing? A. No, I didn't hear him curse.

Q. He didn't use any profane language, if he did you didn't hear him? A. No (R. 53).

Greenville Police Captain Harvey Tackett testified:

He started waving his hands, shouting real loud to the people that were walking on. And, they, most of them, immediately turned and came back around him. He then left the sidewalk and jumped up on the steps of the Police Station and continued to shout and holler, ask people, you see what's happening, what you going to do about it, and such phrases as that (R. 64).

• • • • •

Q. Now, did you hear the defendant use any kind of vulgar language of any kind? A. I did not.

• • • • •

Q. . . . Did he do anything that would appear to you to have been vulgar by his actions? . . . A. No he didn't (R. 73).

Greenville Police Chief William C. Burnley, Jr. testified:

Q. What was he saying? A. What are you going to do? Are you going to let this happen? Statements of that type (R. 77).

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Petitioner testified:

. . . I moved out in front of the Municipal building. As the people was coming out of the building—well, they was coming out just looking as if, you know—some of the people seemed to be kinda shocked as to the conviction of the people, as if they thought they wasn't going to be convicted, and so, people were standing around out there. And so, at that time I felt that they didn't really know what had happened and what was going on. Some people had had to stand on the outside that could have gone into the Courtroom and taken a seat had it not been for the system they were using to seat people, others that were there didn't really know why these kids had been convicted. So, at this time I felt that the 1st Amendment of the United States Constitution gives the right of freedom of speech and peaceful assembly. The people were peacefully assembled out there, and so, I made a few statements. My job is voter registration, to get Negroes registered to vote. And so, then, I started trying to get the attention of the people to tell them that by registering and voting this couldn't have happened. And, at this time, Officer Carson, as I started to talk, came up and—well, he caught me by the shoulder, took me by my arm, and he said, you can't make a public speech without a permit, you cannot make a public speech in front of the building without a permit (R. 107).

• • • • •

. . . And, at that time—the time that I was out there Officer Carson took me by the arm then, and I continued to talk as he carried me in. I was saying dif-

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ferent things like, this wouldn't have happened if Negroes were registered to vote, that in Washington County Negroes are in the majority of the population—50 per cent of the population is Negro and that they could have used the park or any other thing had they been registered voters (R. 108).

• • • • •

I meant that if they were registered—if the people would register to vote, were to get in line and exercise their duties and responsibilities as citizens, as Negro citizens, and as citizens of the United States, they could change some of these things. They could change the policy of being arrested in a park that they paid for as well as any other people and that there wouldn't be such parks that was designated for Whites and for Negroes. This was my intentions and that being arrested there, I felt that they was inciting a riot then, if the people—if the policemen—there were policemen out there, and if at any time they felt that the crowd was going to get unruly, it was their job to move the crowd—there was no attempt made to dispurse [sic] the crowd. Instead, I was arrested for making—for saying what I was saying, you know, I was arrested not—I don't think there was any question as to whether, thought whether the crowd—what would they do, tear down the building, you know. Surely, I didn't think they were going to attack me or attack the policemen there, because we have advocated non-violence, not violence—non-violence is our way of doing things. And, the only thing that I had in mind was to get them to register to vote and to realize what was happening, and I felt that I had a right to do this under the 1st Amendment.

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Q. I take it then, that you did not at any time make any statements or of any kind to encourage them to attack anybody, did you? Did you tell them to rush inside and attack the Judge for his decision? A. No, I did not. In fact I never really finished—I was dragged away before I could get out what I wanted to get out. Each time—as I was carried—as I was being carried into the building, I was talking and I never really made my point (R. 109-10).

B. *Testimony as to the Context of Petitioner's Speech.*

The three police officers and petitioner also testified as to the reaction of the crowd to petitioner's speech.

Officer Carson testified:

Q. And, what was the crowd doing? A. They were talking. Everybody seemed interested in what he was saying.

Q. What was the tempo [sic] of that crowd? A. Well, at the time as I could judge, everybody was getting disturbed.

Q. And what do you mean by disturbed, Willie? A. They didn't like the decision—of what he was talking—what he was telling them (R. 40).

* * * * *

Q. Just tell—just describe that situation as best you can, Willie. What you saw and what was going on in your presence after the defendant began talking to those people? A. Well, my experience in my opinion was a very tense situation and had it kept on anything could happen.

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Q. How do you know it was tense? A. We could tell the crowd and mumbling in the crowd . . . (R. 41-42).

• • • • •

Q. Did you hear anybody in the crowd hollering? A. Oh, you could hear them talking back and hear them saying, it ain't right.

Q. How's that? A. You could hear voices—it ain't right, you know.

Q. But, you didn't hear any oral threats made by anybody in the crowd, did you—on anybody's life? A. No, I didn't.

Q. Or property, you didn't hear that, did you? A. No, I didn't (R. 60-61).

Captain Tackett testified:

They seemed to be crowding more and more around the door of the Police Station and the mumbling and all began to get louder. It seemed as though they were going to try to take the situation in their own hands (R. 66).

• • • • •

Q. I believe you said that you heard some sort of muttering [sic] among the various people in the crowd, is that correct? A. That's right.

Q. And, I believe you told the Court you couldn't understand what they were saying? A. I could not.

Q. So you couldn't tell the crowd was saying, let's get them? A. No, I couldn't.

Q. Or, let's go get that judge? A. I could not. I could say what I heard the defendant McLaurin say.

Q. . . . [D]id you observe or make any observation of anybody in the crowd was armed at the time? A. I didn't see anyone.

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Q. Was the crowd hooping, hollering and yelling when they were in that vicinity? Were the crowd themselves doing a lot of hooping and yelling? A. No, they wasn't (R. 71-72).

Police Chief Burnley testified:

Q. Did you hear what the crowd was saying? A. No, it was a general mumbling, utterance. I couldn't distinguish anything they were particularly saying.

Q. So then, you couldn't tell the Court, then, that there were people in the crowd making any threatening statements or anything like that? A. Well, the general demeanor of the crowd, the appearance of the crowd at a tense situation like that would automatically inform me that it was a tense and sticky situation.

Q. But, you didn't hear any verbal threats? A. No, I did not (R. 81).

Petitioner testified:

Q. Did the crowd appear to be angry and in a tense, angry mood? A. I feel that the crowd was sorta upset as to the outcome of the trial, but certainly the words that I was using wouldn't have caused them to jump—to go in there and try to beat up the Judge. Negroes know they can't go beat up the Judge and be justified, and tear down the building and be justified, or jump on a policeman in the State of Mississippi and be justified.

Q. Well, it wouldn't be justified in any— A. Any place—but they know better—there are certain things that they know (R. 110-11).

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Q. Now, as they came out, you tell this jury that the Negroes that you observed seemed shocked, is that correct? A. Right.

Q. And, they seemed upset? A. Right.

Q. And, that they were shocked and upset at what had taken place in the building, is that correct? A. Yes.

Q. And, that's what you were talking to them about, is it not? A. That's right.

Q. And, that's what you ask them, what are you going to do about it, is that correct? A. Not in the way you say it, no.

Q. Well, that's what you told them, isn't it? A. I wanted to know what would they do to get to try to change—what would they do to register to vote. I would have brought these things out had I been given the opportunity (R. 120).

• • • • •

I was the one that was standing up there doing the talking and I at no time felt that these people were going to attack me. These were people that I had talked with before, people that I know as well as my own people. I didn't feel that they were going to come up and beat me up, you know, do me any harm, and I didn't feel the words that I was saying, I never directed them to go in and get anybody else. I felt that if it was a tense situation out there that these people would—first of all they knew, some of them, that the kids had tried to use the park. They needed some kind of idea as to what steps to take. They were up-set; they were restless. The expressions on their faces characterized by restless energy, that they

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felt that something should be done. But, then all it needed was a leader, and I was going to try to show them where they could register their protest with the Mayor, and I didn't feel that they were going to come up and attack me (R. 202).

• • • • •

Q. State whether or not the statement you were making was for the purpose of relieving the tense situation, if any? A. Certainly if they knew what was going—I always felt that if people know what is going on, then they will know what steps to take, so I was telling them what had happened, and I felt that this was leading them, and one of the things I would have advocated was that they all come together in a meeting later, a mass meeting of some type at church or some hall here and we discuss plans to go out and talk with the City officials, I feel that this would have relieved the tension there, and we would have all gotten together and left the area (R. 203).

Officer Carson told petitioner that he could not continue speaking without a permit (R. 42) and, when petitioner continued speaking, placed him under arrest (R. 43). Carson started to take petitioner into the municipal building, but petitioner tried to pull back (R. 43, 205-06); Carson, who outweighed petitioner by 60 pounds (R. 35, 203), testified, "I finally manhandled him on up through the door" (R. 43).[2]

[2] Once inside the police station, petitioner fell to the floor and lay there motionless (R. 207); he was picked up and carried to the Sergeant's desk for booking, after which he voluntarily got up (R. 207).

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After petitioner's arrest, the crowd was easily dispersed (R. 68, 78).

C. *Proceedings Below.*

Petitioner was charged with breach of the peace, in violation of Miss. Code Ann. §2089.5 (1966 Supp.), p. 2 *supra*, and with resisting arrest, in violation of §252 of the Code of Ordinances of the City of Greenville.[3] He was tried by a jury in the County Court of Washington County on September 16 and 20, 1963; was convicted;[4] and was sentenced to pay a fine of $100 and serve a term of 90 days in the city jail on each charge (R. 24-25; 145-46). Petitioner's convictions were affirmed by the Circuit Court of Washington County and, on June 13, 1966, by the Supreme Court of Mississippi, —— Miss. ——, 187 So. 2d 854 (1966), App. pp. 16a-28a, *infra*.

On January 9, 1967, this Court denied petitioner's petition for writ of certiorari, three Justices dissenting, 385 U. S. 1011.

Thereafter, on February 14, 1967, petitioner filed a petition for a writ of habeas corpus in the United States District Court for the Northern District of Mississippi alleging, in essence, that his confinement[5] by respondent

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[3] Appellant's conviction for resisting arrest must fall if his breach of the peace conviction falls because the trial court correctly charged the jury that appellant could not be convicted of resisting arrest unless he was found to have committed a breach of the peace in the arresting officer's presence (R. 142-43, 145). See 187 So. 2d 860-61; *Wright* v. *Georgia*, 373 U. S. 284, 291-92 (1963); *Shuttlesworth* v. *Birmingham*, 382 U. S. 87 (1965).

[4] Earlier, on July 3, 1963, petitioner was tried and convicted on these charges in the Municipal Court of the City of Greenville.

[5] Subsequent to the filing of his petition, petitioner was released on bond pending decision by the district court (R. 9-10). He remained enlarged on $1500 bond pending appeal to the Court of Appeals by order of the district court (R. 264-65). An application

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punished him for the exercise of his federal constitutional rights of free speech, assembly and petition (R. 3-7). The case was submitted to the district court on the record made in the state court (R. 237-38, 240-41). On December 29, 1967, the district court entered a memorandum opinion holding that Miss. Code Ann. §2089.5 (1966 Supp.) was not unconstitutional on its face or as applied to convict petitioner for his speech (R. 239-53; 279 F. Supp. 220; App., pp. 4a-15a, *infra*). Accordingly, the petition for writ of habeas corpus was denied (R. 254-55).[6]

On October 15, 1968, the Court of Appeals for the Fifth Circuit affirmed the district court's denial of the petition for writ of habeas corpus in a summary *per curiam* opinion (R. 268; App., p. 1a, *infra*).

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to the Court of Appeals to stay the Court's mandate pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure will be filed shortly.

[6] The district court issued a certificate of probable cause on January 15, 1968 (R. 263-64), and a timely notice of appeal was filed January 16, 1968 (R. 265).

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Reasons for Granting the Writ

Certiorari Should Be Granted to Review the Court of Appeals' Holding That the Mississippi Breach of the Peace Statute, Miss. Code Ann. §2089.5 (1966 Supp.), Is Compatible With the First and Fourteenth Amendments. The Case Should Be Set for Argument With *Gunn* v. *University Committee to End the War in Viet Nam*, O. T. 1968, No. 269, in Which This Court Will Review a Ruling That the Texas Breach of the Peace Statute Is Unconstitutional.

Petitioner was convicted on a general verdict of the charge of "disturb[ing] the public peace by loud or offensive language, or by conduct either calculated to provoke a breach of the peace, or by conduct which might reasonably have led to a breach of the peace" (R. 18, 24-25). The charge and verdict implicate the following three prohibitions of §2089.5, whose constitutionality under the First and Fourteenth Amendments petitioner challenged below and challenges here:[7]

1. "Any person who disturbs the public peace, or the peace of others, by . . . loud . . . or offensive . . . language . . . shall be guilty of a misdemeanor. . . ."

2. "Any person who disturbs the public peace, or the peace of others, . . . by conduct . . . calculated to

[7] Because petitioner was convicted by a general verdict, if any of these prohibitions cannot constitutionally be applied to punish petitioner's speech, then his conviction must fall. *Stromberg* v. *California*, 283 U. S. 359, 367-368 (1931); *Williams* v. *North Carolina*, 317 U. S. 287, 291-293 (1942); *Thomas* v. *Collins*, 323 U. S. 516, 529 (1945). Cf. *Shuttlesworth* v. *Birmingham*, 382 U. S. 87, 92 (1965).

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provoke a breach of the peace . . . shall be guilty of a misdemeanor. . . ."

3. "Any person who disturbs the public peace, or the peace of others, . . . by conduct which may lead to a breach of the peace . . . shall be guilty of a misdemeanor. . . ."

Petitioner submits that none of these prohibitions is drawn with the narrow specificity required to punish speech of the kind which this record reveals. *NAACP* v. *Button*, 371 U. S. 415, 433 (1963). Here, as in *Cantwell* v. *Connecticut*, 310 U. S. 296, 308 (1940), we have "a conviction under a statute sweeping in a great variety of conduct under a general and indefinite characterization, and leaving to the executive and judicial branches too wide a discretion in its application." Consistently and repeatedly this Court has held that prohibitions rationally indistinguishable from Mississippi's §2089.5 could not constitutionally be applied to forms of speech rationally indistinguishable from petitioner McLaurin's. *Cantwell* v. *Connecticut*, 310 U. S. 296, 307-11 (1940); *Terminiello* v. *Chicago*, 337 U. S. 1, 4-5 (1949); *Edwards* v. *South Carolina*, 372 U. S. 229, 236-38 (1963); *Cox* v. *Louisiana*, 379 U. S. 536, 551-52 (1965); *Dombrowski* v. *Pfister*, 380 U. S. 479, 486-87 (1965); *Ashton* v. *Kentucky*, 384 U. S. 195, 200-201 (1966).

There is a common infirmity running through these prohibitions punishing speech thought to be "offensive" or "calculated to provoke," or "which may lead to," a breach of the peace. It is the subjection of citizens' freedom of speech to censorship under the impressionistic and variable standards of a policeman's calculation of public temper, thus "allow[ing] persons to be punished merely for peace-

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fully expressing unpopular views" (*Cox* v. *Louisiana, supra,* 379 U. S. at 551). This rationale was developed in Mr. Justice Black's concurring opinion in *Cox,* in which he condemned statutes allowing a policeman to curb a citizen's right of free speech

> whenever a policeman makes a decision on his own personal judgment that views being expressed on the street are provoking or might provoke a breach of the peace. Such a statute does not provide for government by clearly defined laws, but rather for government by the moment-to-moment opinions of a policeman on his beat. Compare Yick Wo v. Hopkins, 118 U. S. 356, 369-370, 20 L ed 220, 226, 6 S Ct 1064. This kind of statute provides a perfect device to arrest people whose views do not suit the policeman or his superiors, while leaving free to talk anyone with whose views the police agree (379 U. S. at 579).

We think it hardly necessary to demonstrate that two of the three prohibitions of Miss. Code Ann. §2089.5 employed against petitioner cannot pass constitutional muster under this principle. The points seem settled, if this Court's recent decisions can settle the law of the Constitution. In *Ashton* v. *Kentucky,* 384 U. S. 195 (1966), this Court reviewed its cases dealing with language virtually identical to Mississippi's proscription of conduct "calculated to provoke a breach of the peace":

> These decisions [*Edwards* v. *South Carolina; Cox* v. *Louisiana*] recognize that to make an offense of conduct which is 'calculated to create disturbances of the peace' leaves wide open the standard of responsibility. It involves calculations as to the boiling point of a par-

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> ticular person or a particular group, not an appraisal of the nature of the comments per se [and is thus unconstitutional under the First and Fourteenth Amendments] (384 U. S. at 200).

The proscription of conduct "which may lead to a breach of the peace" can fare no better. *Cox* v. *Louisiana, supra,* voided convictions for speech conduct similar to petitioner's under a Louisiana breach-of-the-peace statute that is identical in its operative language to §2089.5. The Louisiana statute was held facially unconstitutional on reasoning that plainly applies to and equally condemns §2089.5. The district court below sought to distinguish *Cox* on the theory that the construction of §2089.5 by the Mississippi courts differed from the construction by the Louisiana courts of the identical Louisiana statutory language (R. 248-49; 279 F. Supp. at 225; App., p. 11a, *infra*). But the jury charge authorized petitioner's conviction on grounds which are precisely those condemned in *Cox* (R. 20-21); and the Mississippi Supreme Court, in affirming petitioner's conviction, did not distinguish *Cox* by purporting to construe its statute differently from the Louisiana law there struck down. It found only that the "factual situation involved in this case is entirely different. . . ." 187 So. 2d at 860, App., p. 28a, *infra.*

Whatever factual differences there may be—and we submit that they are inconsiderable—petitioner's conduct, like Cox's, was entirely peaceful and non-inflammatory. If his acts were criminal, they were so because §2089.5 penalized incidents of them that were identical to the incidents on which Cox's unconstitutional conviction also rested.

Cox had addressed a group of about 2,000 young Negro students on the sidewalks between the State Capitol and

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the courthouse in Baton Rouge, Louisiana. His was a speech of protest (379 U. S. at 542-43):

> [Cox] gave a speech, described by a State's witness as follows:
>
> He said that in effect it was a protest against the illegal arrest of some of their members and that other people were allowed to picket . . . and he said that they were not going to commit any violence, that if anyone spit on them, they would spit back on the person that did it.
>
> Cox then said:
>
> All right. It's lunch time. Let's go eat. There are twelve stores we are protesting. A number of these stores have twenty counters; they accept your money from nineteen. They won't accept it from the twentieth counter. This is an act of racial discrimination. These stores are open to the public. You are members of the public. We pay taxes to the Federal Government and you who live here pay taxes to the State.

The sheriff testified that, in his opinion, constitutional protection for the speech ceased "when Cox, concluding his speech, urged the students to go uptown and sit in at lunch counters" (379 U. S. at 546), but this Court disagreed:

> The Sheriff testified that the sole aspect of the program to which he objected was "[t]he inflammatory manner in which he [Cox] addressed that crowd and told them to go on uptown, go to four places on the protest list, sit down and if they don't feed you, sit there for one hour." Yet this part of Cox's speech obviously did not deprive the demonstration of its pro-

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tected character under the Constitution as free speech and assembly (379 U. S. at 546).

Petitioner McLaurin's speech was, like the speech protected in *Cox*, a stirring and vigorous encouragement to his listeners to assert their federal rights; it was no invitation to violence. Even when the record is viewed most favorably to the prosecution, it is apparent that petitioner's speech did not amount to the "fighting words" held constitutionally unprotected in *Chaplinsky* v. *New Hampshire*, 315 U. S. 568 (1942).[8] Nor did his speech present a case like *Feiner* v. *New York*, 340 U. S. 315 (1951), where "the speaker passes the bounds of argument or persuasion and undertakes incitement to riot" (340 U. S. at 321).[9] In his speech of 8 or 9 minutes (R. 244; 279 F. Supp. at 223, App. p. 8a, *infra*), even his most forceful statements, viewed in their context, were neither an explicit incitement nor a subtle invitation to riot. See pp. 4-12, *supra*. All that petitioner urged his listeners to "do" was to register to vote so that illegal segregation would end in Washington County. All that his listeners did was to listen.

It is true, as the courts below found, that appellant spoke in a "loud voice" (R. 243; 279 F. Supp. at 223; App. p. 7a, *infra*). But the Mississippi prohibition of "loud or offen-

[8] The speaker in *Chaplinsky* met the following test developed by the New Hampshire Supreme Court: "The test is what men of common intelligence would understand would be words likely to cause an average addressee to fight. . . . The English language has a number of words and expressions which by general consent are 'fighting words' when said without a disarming smile" (315 U. S. at 573).

[9] The speaker in *Feiner* urged Negroes to take up arms against whites (340 U. S. at 317). There is little indication what statutory language was there invoked and no indication that the issue of a statutory invalidity was raised. See 340 U. S. at 318-19.

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sive language" cannot reasonably be distinguished from the proscription of "loud and vociferous language" in the Texas breach of the peace statute struck down in *University Committee to End the War in Viet Nam* v. *Gunn* (W. D. Texas, No. 67-63-W, three-judge court, decided April 9, 1968). On October 14, 1968, this Court noted probable jurisdiction of the State's appeal in that case. *Gunn* v. *University Committee to End the War in Viet Nam,* O. T. 1968, No. 269. The district court in *Gunn* considered the Texas statute against a background of several state court decisions attempting to give it a narrowing construction. Nevertheless, the court concluded, in language precisely applicable here (slip op., p. 9):

> It cannot be doubted that the provision regarding the use of loud and vociferous language would, on its face, prohibit speech which would stir the public to anger, would invite dispute, would bring about a condition of unrest, or would create a disturbance. In so doing the statute on its face makes a crime out of what is protected First Amendment activity. This is impermissible.

In the present case, the sole attempt at limiting construction of Miss. Code Ann. §2089.5 consists of the following language of the Mississippi Supreme Court affirming petitioner's conviction on direct appeal (187 So. 2d 854, 859; App., pp. 25a-26a, *infra*):

> Appellant contends that he has been convicted of expressing unpopular views, and the construction of Mississippi Code Annotated section 2089.5 (Supp. 1964) by the trial court comes within the rule announced in *Terminiello, supra.* This directs our attention to the

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> construction placed upon the statute by the trial court. This is reflected by the instructions to the jury as requested by the City and by the appellant. The court instructed the jury that if appellant was arrested for public protest against racial segregation, then they could not find the defendant guilty. The trial court recognized that section 2089.5 could not be applied to restrict appellant's constitutional right to protest against racial segregation, and that this statute could not be used to infringe upon the constitutional right of appellant or any other person to speak freely within the framework of the law. This Court is fully cognizant of our duty to construe our statutes in such a manner to be sure that they will not infringe upon the constitutional rights of any person. The statute as construed by the trial court is not unconstitutional.

The district court below held that this language brought the statute within constitutional bounds (R. 248-49; 279 F. Supp. at 225; App., p. 11a, *infra*):

> In the case here, the statute, as interpreted by the state court, permits a conviction for speech only if that speech was calculated to lead to a breach of the peace or was of such a nature as ultimately led to a breach of the peace. There can be no conviction for *peacefully* exercising the right of free speech. This is consistent with the principle that one may be found guilty of breach of the peace if he commits acts or makes statements likely to provoke violence and disturbance of good order, even though no such eventuality be intended. *Cantwell* v. *State of Connecticut, supra.* Under the statute here in question, so long as the speech was *peaceful*—regardless of whether it in-

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> vited dispute, brought about a condition of unrest or stirred people to anger—a conviction was not warranted. (Emphasis in original)

But this interpretation—if the Mississippi Supreme Court's defense of the statute can be taken as an "interpretation" in the sense of limiting the statute's scope—obviously fails by a wide margin to restrict §2089.5 within permissible First Amendment bounds. The interpretation nods tactfully to the First Amendment but does nothing operatively to protect it. On one hand, a speaker can be arrested and convicted if the arresting officer and the jury think that he has made statements, however unintentionally, likely to disturb good order. On the other hand, it is said that there can be no conviction of those who "speak freely within the framework of the law" (in the words of the Mississippi Supreme Court) or of those who are "peacefully exercising the right of free speech" (in the words of the district court below). The guidance thus provided to the arresting officer and the jury is minimal; the statutory language simply leaves everything to their discretion. The long slope between "free speech" and "loud or offensive language" remains unmarked by any concrete or even helpfully approximative boundary. As "interpreted," §2089.5 remains serviceable to justify petitioner's arrest and conviction on the grounds that the arresting officer and the jury thought his speech too critical of the Police Court's decision,[10] and therefore "offensive" and "nonpeaceful"; *or* on the grounds they thought it simply too loud.

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[10] The district court found that petitioner, in his speech, "denounced [the girls'] convictions as 'bad' " (R. 243; 279 F. Supp. at 223; App., p. 7a, *infra*). The convictions *were* bad, but were not reversed until two years later. See note 1, *supra*.

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Not only *Gunn*, but *Carmichael* v. *Allen*, 267 F. Supp. 985, 997-99 (N. D. Ga. 1967), bespeaks the invalidity of this Mississippi proscription of offensive language. In *Carmichael*, the three-judge court invalidated a prohibition of "vulgar" language under the principles of *Cantwell* v. *Connecticut*, *supra*, and *Cox* v. *Louisiana*, *supra*, saying (267 F. Supp. at 998-99):

> Moreover, it takes no elaboration to demonstrate that the term 'vulgar' in connection with 'language' . . . leaves 'to the executive and judicial branches too wide a discretion in the application' of the law. It too readily permits them to make a crime out of what is protected activity.

CONCLUSION

In sum, petitioner has been convicted in exactly the manner forbidden by this Court's decisions from *Cantwell* and *Terminiello* through *Cox* and *Ashton*, under a statute written and construed in language which is virtually identical to that condemned by those decisions. The present case thus poses the essential issue whether this Court's pronouncements will be enforced as viable protections of the First Amendment or ignored as unserviceable to suit police convenience. On its post-conviction record, it also affords additional perspectives on the issue of statutory overbreadth and vagueness presently pending before the Court in *Gunn*.

The conduct in petitioner McLaurin's case was speech, pure and simple. Uncomfortable as it may have made the arresting officers, it was consistent with our tradition "that debate on public issues should be uninhibited, robust and

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wide-open, and that it may well include vehement, caustic and sometimes unpleasantly sharp attacks on government and public officials" (*New York Times Co.* v. *Sullivan*, 376 U. S. 254, 270 (1964)). The protection of that tradition cannot be abandoned to the moment-to-moment opinions of a policeman on his beat.

For the foregoing reasons, petitioner prays that the petition for writ of certiorari be granted and that the case be set for argument with *Gunn* v. *University Committee to End the War in Viet Nam*, O. T. 1968, No. 269.

Respectfully submitted,

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APPENDIX

In the United States Court of Appeals
for the Fifth Circuit

In re

UNITED STATES COURT OF APPEALS

For the Fifth Circuit

No. 25762

CHARLIE McLAURIN,

Appellant,

versus

WILL **APPENDIX**, Jr.,
Custodian of the Greenville City Jail,

Appellee.

Appeal from the United States District Court for the Northern District of Mississippi

---

(October 15, 1968)

Before GOLDBERG and AINSWORTH, Circuit Judges,
and STEGER, District Judge.

PER CURIAM: The memorandum opinion [illegible] this cause by the District Court and reported in 279 F. Supp. 220 (N.D. Miss. 1967) is hereby approved and [illegible] judgment denying the petition for writ of habeas corpus [illegible].

APPENDIX

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APPENDIX

Opinion of the United States Court of Appeals for the Fifth Circuit

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 25765

CHARLES McLAURIN,

Appellant,

versus

WILLIAM C. BURNLEY, JR.,
Custodian of the Greenville City Jail,

Appellee.

Appeal from the United States District Court for the Northern District of Mississippi

---

(October 15, 1968)

Before GOLDBERG and AINSWORTH, Circuit Judges, and SPEARS, District Judge.

PER CURIAM: The comprehensive memorandum opinion filed in this cause by the District Court and reported in 279 F. Supp. 220 (N.D. Miss. 1967) is hereby approved, and the judgment denying the petition for writ of habeas corpus is AFFIRMED.

Judgment of the United States Court of Appeals for the Fifth Circuit

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

OCTOBER TERM, 1968

No. 25765

D. C. Docket No. GC 678

CHARLES McLAURIN,

Appellant,

versus

WILLIAM C. BURNLEY, JR., Custodian of the Greenville City Jail,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF MISSISSIPPI

Before GOLDBERG and AINSWORTH, Circuit Judges, and SPEARS, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Mississippi, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellant, Charles McLaurin, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

October 15, 1968

Issued as Mandate:

Opinion of the United States District Court for the Northern District of Mississippi

IN THE

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF MISSISSIPPI

GREENVILLE DIVISION

No. GC678

CHARLES MCLAURIN,

Petitioner,

v.

WILLIAM C. BURNLEY, JR., Custodian of the Greenville City Jail,

Respondent.

MEMORANDUM OPINION

After petitioner's arrest and conviction in the Police Court of Greenville, Mississippi, for breach of the peace (Miss. Code Ann. § 2089.5) and resisting arrest (Code of Ordinances, City of Greenville, § 252 Rev. Ed. 1938), there was an appeal to the County Court of Washington County and a de novo separate jury trial on each of these charges with verdicts of guilty; an appeal to the Circuit Court of Washington County, Mississippi, which affirmed petitioner's convictions on the records made in county court; an appeal to the State Supreme Court, which also affirmed [*McLaurin* v. *Greenville*, 187 So.2d 860 (Miss. 1966)]; and,

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the filing of a petition for a writ of certiorari with the Supreme Court of the United States, which was denied [*McLaurin* v. *Greenville*, 385 U.S. 1011, 17 L. Ed. 2d 548 (1967)] (with three judges dissenting). Now in spite of pronouncements that a criminal case should some time reach a final conclusion,[1] petitioner once again has challenged the validity of his convictions and, apparently, still is convinced that he has not been afforded due process of law. The federal issues here presented are substantially the same as those presented to the United States Supreme Court in the petition for writ of certiorari, but the denial thereof cannot be interpreted as an expression of that court's opinion on the merits. *Brown* v. *Allen*, 344 U.S. 443, 73 S. Ct. 397, 97 L. Ed. 469 (1953).

On February 14, 1967, the petitioner, Charles McLaurin, filed a petition for a writ of habeas corpus in this court and named as respondent thereto the custodian of the Greenville City Jail, located in Greenville, Mississippi.[2] On that same date, the respondent was ordered to show cause why the relief prayed for in said petition should not be granted. The respondent seasonably filed its response, and the issues presented by the petition are now before the court on the record made in the state trial court, the briefs submitted in the United States Supreme Court on petitioner's application for a writ of certiorari, additional briefs submitted in this court and a stipulation which was filed on September 7, 1967. An evidentiary hearing was initially sought by the petitioner, but later, when such a hearing was set, that request was withdrawn, and the case

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[1] E.g., *Allison* v. *Holmon*, 326 F.2d 294 (5 Cir. 1963).

[2] Who is the Chief of Police.

was submitted on the record made in state court, in lieu of any further evidentiary hearing in this court.

The entire record aforementioned has been carefully considered. It is clear that the merits of the factual dispute were adequately developed and resolved in the state court, and the conclusions therefrom are supported by the record; that the state employed an adequate fact-finding procedure; that no allegation of newly discovered evidence has been presented and that no reason here exists which indicates that the petitioner did not have a full and fair factual hearing throughout his state litigation. This court now independently so finds. Consequently, no further evidentiary hearing under the standards set forth in *Townsend* v. *Sain*, 372 U.S. 293, 83 S. Ct. 745, 9 L. Ed. 2d 770 (1963), is indicated—a fact which is admitted by petitioner.

In the Supreme Court of Mississippi, by assignment of error, the petitioner alleged: that the state breach-of-the-peace statute (Miss. Code Ann. § 2089.5) is unconstitutional, that his convictions of the subject offenses constituted punishment for the exercise of free speech and that his convictions were founded upon no evidence of guilt.[1] These precise contentions are again presented here, and though they were expressly rejected by the State Supreme Court, it is this court's duty, in considering the present petition for a writ of habeas corpus, to independently apply applicable federal law to the state court findings of fact, if those fact findings were there "reliably found". *Townsend* v. *Sain*, supra, 9 L. Ed. 2d at 789. No "vital flaw having been found in the process of ascertaining such facts in the state courts" [*Brown* v. *Allen*, supra, 97 L. Ed.

[1] Other assignments of error presented to the State Supreme Court have not here been seriously urged and are considered abandoned.

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at 514 (opinion of Frankfurter, J.)], this court is authorized to and does place much reliance upon that court's factual determinations. *Ibid.* Such facts are fully reported at —— Miss. ——, 187 So.2d 854, and are only repeated where necessary here.

Immediately following the trial and convictions[4] of two Negro girls in the Police Court of Greenville, McLaurin began exhorting a crowd of about 200 people, predominately Negro, which had gathered outside the courthouse. In his speech, which was described as being in a "loud voice", he denounced these convictions as "bad" and challenged the crowd with "what they intended to do about it". Obviously, many of those present disagreed with these convictions. The crowd was described as "getting disturbed" and as engaged in "mumbling and muttering". The situation was said to be "tense".

One Negro police officer testified that "in my opinion [it] was a very tense situation and had it kept on anything could have happened". Another officer testified that during petitioner's talk the crowd "seemed to be crowding more and more around the door of the building and the mumbling began to get louder". It seemed as though they were "going to try to take the situation in their own hands". The Chief of Police of Greenville, Mississippi, testified that in his opinion "at any moment we could have had a riot or some violence", because the crowd was "answering him [the petitioner] and becoming emotional".[5] The petitioner, on cross-examination, conceded that when he began to address the crowd they were "sort of upset" and seemed "shocked and confused" at the aforementioned convictions.

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[4] These convictions were later set aside on appeal.

[5] All the police officers who testified were experienced law enforcement officials who had on previous occasions had experience in dealing with mobs.

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The testimony further shows that after some eight or nine minutes of talking, the petitioner was told that he would have to stop speaking unless he obtained a permit. Petitioner purportedly ignored this warning, kept talking and was placed under arrest. When the police officers started taking petitioner inside the building, he "kept pulling back", and the arresting officers were forced to manhandle him to get him into custody. One arresting officer testified that it required all his strength to remove the petitioner from the scene. There is also testimony that petitioner during the course of his being arrested went "limp".

Following the arrest of the petitioner, the crowd allegedly remained in attendance in the immediate area of the municipal building and was later dispersed by a number of police officers described by one witness as a "riot squad".

In county court on the aforementioned jury trials, with testimony of this nature presented and being instructed by the court that "if you find that the defendant was arrested for peaceful protest against racial segregation, then you cannot find the defendant guilty", a trial jury found the petitioner guilty of violating § 2089.5, Miss. Code Ann. (1966 Supp.). Another trial jury also found him guilty of resisting arrest under § 252, Code of Ordinances, City of Greenville, Rev. Ed. 1938.[6]

I.

It is initially asserted as the basis for the present habeas petition that the petitioner was convicted under an unconstitutional state statute. The applicable statute provides:

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[6] This ordinance provides, in part, that:

> Any person who knowingly and wilfully opposes or resists any officer of the city in executing, or attempting to make any lawful arrest, . . . shall be guilty of a misdemeanor.

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> Any person who disturbs the public peace, or the peace of others, by violent, or loud, or insulting, or profane, or indecent, or offensive, or boisterous conduct or language, or by the intimidation, or seeking to intimidate any other person or persons, or by conduct either calculated to provoke a breach of the peace, or by conduct which may lead to a breach of the peace, or by any other act, shall be guilty of a misdemeanor . . . .
>
> Miss. Code Ann. § 2089.5.

If this position is well taken, the foundation of the whole proceedings are affected, for "an unconstitutional law is void, and is as no law. An offense created by it is not a crime. A conviction under it is not merely erroneous, but is illegal and void, and cannot be a legal cause of imprisonment." *Fay* v. *Noia,* 372 U.S. 391, 83 S. Ct. 822, 9 L. Ed. 2d 837 (1963).

It is now settled that "only a compelling state interest in the regulation of a subject within the state's constitutional power to regulate can justify limiting First Amendment freedoms". *NAACP* v. *Button,* 371 U.S. 415, 83 S. Ct. 328, 9 L. Ed. 2d 405. The State of Mississippi has an obvious interest in the preservation and protection of peace and good order within her borders. The Supreme Court has stated that:

> This court respects, as it must, the interest of the community in maintaining peace and order on its streets.
>
> *Feiner* v. *New York,* 340 U.S. 315, 95 L. Ed. 297 (1951).

The statute now under attack evinces a legislative judgment that speech which is either calculated to lead to a breach of the peace or which may lead to a breach of the

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peace should be regulated. "Such a declaration of the state's policy [if narrowly drawn to prevent the supposed evil] would weigh heavily in any challenge of the law as infringing constitutional limitations." *Cantwell* v. *Connecticut,* 310 U.S. 296, 84 L. Ed. 1213 (1940). It has been stated that:

> The offense known as breach of the peace embraces a great variety of conduct destroying or menacing public order and tranquility. It includes not only violent acts but acts *and words* likely to produce violence in others. No one would have the hardihood to suggest that the principle of freedom of speech sanctions incitement to riot . . . . When clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order, appears, the power of the state to prevent or punish is obvious. (Emphasis added.)
>
> *Cantwell* v. *Connecticut,* supra, 84 L. Ed. at 1220.

Petitioner contends that this statute is unconstitutional in its overly broad scope. During this litigation, the state trial court instructed the jury, in effect, that this statute could not be utilized to punish the petitioner for peacefully protesting racial segregation. The Supreme Court of Mississippi has, on at least two occasions, expressly recognized its duty to construe state statutes in such a manner so as to insure that they will not infringe upon any person's constitutional rights. *McLaurin* v. *Greenville,* supra; *Bolton* v. *Greenville,* —— Miss. ——, 178 So.2d 667 (1965). This court "can only take the statute [here challenged] as the state courts read it" [*Terminiello* v. *Chicago,* 337 U.S. 4, 93 L. Ed 1131 (1949)]; the interpre-

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tation of this statute and policy pronouncement by the state court distinguish this case from the cases of *Cox* v. *Louisiana,* 379 U.S. 536, 85 S. Ct. 453, 13 L. Ed. 2d 471 (1965) and *Edwards* v. *South Carolina,* 372 U.S. 229, 83 S. Ct. 680, 9 L. Ed. 2d 697 (1963), cited by petitioner as supporting his position.

In *Cox* and *Edwards,* the state courts defined "an offense so as to permit convictions of the petitioners if their speech stirred people to anger, invited public dispute, or brought about a condition of unrest". 9 L. Ed. 2d at 697. "A condition resting on any of these grounds," said the court, "cannot stand." *Ibid;* see also *Terminiello* v. *Chicago,* supra.

In the case here, the statute, as interpreted by the state court, permits a conviction for speech only if that speech was calculated to lead to a breach of the peace or was of such a nature as ultimately led to a breach of the peace. There can be no conviction for *peacefully* exercising the right of free speech. This is consistent with the principle that one may be found guilty of breach of the peace if he commits acts or makes statements likely to provoke violence and disturbance of good order, even though no such eventuality be intended. *Cantwell* v. *Connecticut,* supra. Under the statute here in question, so long as the speech was *peaceful*—regardless of whether it invited dispute, brought about a condition of unrest or stirred people to anger—a conviction was not warranted.

By this statute, the State of Mississippi proscribes only nonpeaceful speech, speech calculated to cause or likely to cause a shattering of peace and order, which the state has a right to do. This limitation on speech is within the state's constitutional power. As interpreted by the state courts in this case, Miss. Code Ann. § 2089.5 (1966 Supp.) is not unconstitutional.

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II.

The petitioner also contends that his state convictions, based upon the actions taken by him, constitute punishment for the exercise of free speech and that, therefore, these convictions should be invalidated. In *Feiner* v. *New York,* supra, a similar contention was presented to and rejected by the Supreme Court. In *Feiner,* the petitioner urged in a loud, high-pitched voice that Negro citizens rise up in arms and fight for civil rights. The crowd in *Feiner* was described as restless and was said to have been pushing, shoving and milling around. At least one member of the crowd threatened violence. The Supreme Court in affirming the petitioner's conviction said:

> The findings of the [state] courts as to the condition of the crowd and refusal of the petitioner to obey the police requests, supported as they are by the record of this case, are persuasive that the conviction of the petitioner . . . does not exceed the bounds of proper police action.
>
> 95 L. Ed. at 300.

The court further said that it was well aware that the ordinary murmurings and objections of a hostile audience cannot be allowed to silence a speaker or to break up an otherwise lawful, public meeting. But, where, said the court, the speaker "passes the bounds of argument and persuasion and undertakes incitement to riot, the police are not, in the name of free speech, powerless to prevent a breach of the peace".

In *Edward* v. *South Carolina,* supra, and *Cox* v. *Louisiana,* supra, the court noted that the factual situation in those two cases was a "far cry" from the situation presented in *Feiner,* for in *Edwards* and *Cox,* there was

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no violence or threat of violence on the part of any member of the crowd there involved. In the present case, as in *Feiner,* there is ample evidence to support a jury conclusion that the crowd was restless and potentially dangerous; there is testimony that it was tense—the petitioner admits that the people making up the crowd seemed shocked at the outcome of the trial which they were attending—there is testimony from three experienced police officers that in their opinion mob violence was imminent; there is testimony of some pushing and crowding in and around the entrance to the building.[7] In spite of these similarities, the petitioner urges that *Feiner* is not applicable, but that *Edwards* and *Cox* control. With this contention, this court does not agree.

The state court concluded, at least inferentially, that the petitioner's conduct in light of the surrounding circumstances, exceeded the bounds of argument and persuasion and was calculated to or could have led to a breach of the peace. This court cannot say that such a conclusion is wrong. The evidence was sufficient to warrant the jury verdicts. Therefore, this court holds that petitioner was not convicted of conduct protected by the First and Fourteenth Amendments, and his arrest and conviction did not exceed the bounds of proper state police action.

III.

Finally, petitioner argues that there is no evidence to support his convictions. From what has already been said,

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[7] Which also housed the city jail. It has recently been held that First Amendment freedoms were not violated by the arrest and conviction of civil rights demonstrators for trespassing upon the curtilage of the county jail. *Adderly* v. *Florida,* —— U.S. ——, 17 L. Ed. 2d 149 (1966).

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it is apparent that there is no merit in this contention, and this court now so finds.

This court judicially knows that over almost all the length and breadth of this country, speeches cast in strikingly similar language, protesting police action in what petitioner here calls "a vigorous and stirring nature", have preceded barbaric savagery, bloodshed, death, looting and the wanton destruction of millions of dollars of property. The roll of the places where peace and order were not maintained—where the thin veneer of civilization was torn asunder—where the faceless mob ran rampant, unchecked by the forces of law and civilization—is a long and disgraceful one: Watts, Hough, Rochester, Trenton,....

In Greenville prompt and efficient police work, which went directly to the source of trouble and then established unquestioned control, which was promptly followed by dispersal of what petitioner's counsel describes as a "mob", probably averted what could have been another such tragic occurrence in that community.

More, much more, than the simple arrest of a "civil rights worker" is involved here. At stake, is the right of a community to preserve the peace and to protect itself from riots and disorder.

The petitioner has been afforded every protection of the law. He has had his day in the Police Court of Greenville, in the County Court, in the Circuit Court, in the Supreme Court of Mississippi, and his petition to the Supreme Court of the United States for review of his convictions has been considered and denied. He now has had his day in this court. The record here is unchanged. He offered no new evidence. The time has come, in fact the time is long overdue, for this litigation to come to

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an end. It is right, it is constitutional (sometimes apparently not the same) for this book to be closed. Insofar as this court is concerned, it is.

An order will be entered to deny the Great Writ to this petitioner, since the record shows that he is not entitled to the extra-ordinary protection which it affords.

This the 29th day of December, 1967.

CLAUDE F. CLAYTON
Claude F. Clayton
UNITED STATES CIRCUIT JUDGE
Sitting by Special Designation
as District Judge

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Opinion of the Supreme Court of Mississippi

IN THE

SUPREME COURT OF MISSISSIPPI

No. 43,429

CHARLES MCLAURIN,

—v.—

CITY OF GREENVILLE.

INZER, Justice:

Appellant, Charles McLaurin, was convicted on a charge of disturbance of the public peace in violation of Mississippi Code Annotated section 2089.5 (Supp. 1964) in the Municipal Court of the City of Greenville. He appealed to the County Court of Washington County, where he was tried *de novo* before a jury. This trial resulted in a conviction, and he was sentenced to pay a fine of $100 and serve a term of ninety days in the city jail. From this conviction, he appealed to the circuit court, wherein the conviction was affirmed. The circuit judge allowed an appeal to this Court because of the constitutional question involved.

When this case reached this Court, it was consolidated with three other cases for the purposes of argument and submission to the Court. They are Cause No. 43,436,

which is a similar charge against Charles Cobb; Cause No. 43,497, which is a charge against this same appellant, Charles McLaurin, for resisting arrest; and Cause No. 43,498, which is a similar charge against Charles Cobb. The cases will be disposed of by separate orders. After the cases were submitted, it was discovered that the affidavits upon which these charges were based were not a part of the record; although they had been so designated by appellants in their notice of designation of record. The attention of counsel for the City and appellants was directed to this defect. The City suggested a diminution of the record, which suggestion was sustained. The affidavits are now a part of the records in all four cases.

The appellant's assignment of errors is as follows:

I. The court below erred in affirming a judgment of conviction which punishes conduct in the exercise of the right of free speech guaranteed by the Fourteenth Amendment to the Constitution of the United States.

II. The court below erred in approving the refusal of the trial court to give appellant's instruction that the jury could not find appellant guilty of breach of the peace if the police officers had made no reasonable effort to calm or disperse appellant's audience.

III. The court below erred in affirming a judgment of conviction based upon no evidence of guilt.

IV. The court below erred in affirming a judgment of conviction under a statute so vague and indefinite as to permit the punishment of the exercise of the right

of free speech guaranteed by the Fourteenth Amendment to the Constitution of the United States.

V. The court below erred in approving the denial by the trial court of appellant's motion to quash the jury panel on the ground of systematic exclusion of Negroes therefrom through prosecutorial abuse of peremptory challenges.

The proof on behalf of the City is sufficient to show that on July 1, 1963, a large crowd of people were present at the Municipal Court in the City of Greenville where two Negro girls were being tried on a charge of disorderly conduct. The courtroom which is in the municipal building seats about 300 people, and it was filled to capacity. About one-half of the people in the courtroom were Negroes, and one-half were white. There was also a large crowd, consisting of mostly Negroes, on the outside of the courtroom. Appellant was present at the trial, but was not in the courtroom. He had gone into the courtroom prior to the trial and was directed to a seat by Officer Willie Carson; however, he did not sit where Officer Carson directed him to sit, and when Carson spoke to him about it, McLaurin protested that the courtroom was segregated. He then went out of the courtroom and protested to the chief of police about the courtroom being segregated. When he returned to enter the courtroom, it was filled to capacity, and he was not allowed to enter again.

The trial resulted in the conviction of the two girls being tried, and most of the people then departed from the courtroom. Thereafter, although court was still in

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session, McLaurin went outside the building and after talking with some of the people who were present at the trial, he began to shout in a loud voice, attracting the attention of the people who were leaving, and many turned and came back. He backed up on the steps of the building, and in a loud voice began exhorting the crowd of about 200 people, mostly Negroes, which had gathered around him in front of the building. The crowd blocked the sidewalk all the way to the street and the entrances to the building. Officer Carson was on the outside of the building after the trial, and he testified that the crowd around McLaurin appeared to be upset over the outcome of the trial. Officer Carson is a Negro and had been employed on the police force in the City of Greenville for over thirteen years prior to the trial. He holds the rank of detective and has had experience as a military policeman in the armed forces. He said that McLaurin said in a loud voice, "What you people going to do about this; this is wrong, the White Caucasian, this law is wrong; you going to take it; you going to let them get away with it." The crowd began to mutter and say that it wasn't right. It appeared to Officer Carson that the situation was very tense and anything could happen. It was his opinion that McLaurin was exciting the crowd in order to get them to do something about the court's decision. Carson made his way through the crowd to where McLaurin was standing and told him he would have to stop, and that he could not block the sidewalk. McLaurin continued to talk, and once again Carson told him to stop. McLaurin refused, and Carson placed him under arrest. After he was arrested, McLaurin kept pulling back and talking over

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Carson's shoulder to the crowd, saying, "He's arresting me, what are you going to do about it." In order for Carson to get McLaurin into the building and out of the crowd, it was necessary for him to use all of his strength.

Captain Harvey Tackett, also a member of the City Police Force, was in front of the police station after the trial. He said that the first time he saw McLaurin, he was in the middle of the sidewalk in front of the station, and McLaurin started waving his arms and shouting in a loud voice to the people that were leaving. Most of the people immediately came back and gathered around McLaurin who then "jumped" upon the steps of the building and continued to shout and holler, asking the people what they were going to do about what had happened. The crowd started mumbling and saying something that he could not understand, but they appeared to be agreeing with McLaurin. It was his opinion that the crowd was about to take the situation into their own hands, and he thought that a breach of peace was imminent. He had had long experience in police work, and it was his opinion that McLaurin would have to be removed or there would likely be a riot. He started over to where McLaurin was standing, but before he reached him, Officer Carson reached McLaurin and said something to him, which Captain Tackett could not hear. McLaurin kept shouting and hollering and waving his arms, and Carson said something else to him; however, McLaurin continued shouting. Then he saw Carson take McLaurin by the arm and forcibly carry him inside the building. During this time McLaurin was still shouting to the crowd.

Chief of Police W. C. Burnley was also present at the scene and saw and heard what transpired. He had been

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on the police force in Greenville for seventeen years and was a graduate of the FBI National Academy. He had received special training in methods relative to dealing with crowds. It was his opinion that the situation on the outside of the building was very tense. He saw McLaurin "jump" to the steps of the building and begin to shout and wave his arms in an emotional manner. He saw the people gather around him and many that were leaving turned and came back. He heard McLaurin shout, "Are you going to take this; what are you going to do about it," repeating these words over and over and other statements that he could not remember. It was his opinion that the speech of McLaurin was having an emotional effect upon the already tense crowd, and that any moment a riot or some other violence could take pace.

Charles Cobb who was a Field Secretary employed by the Student Non-violent Co-ordinating Committee testified in behalf of appellant. It was his testimony that he saw McLaurin when he entered the courtroom and saw Officer Carson go up to him and say something. McLaurin then left, and Cobb went out to ascertain why McLaurin had left. He went with McLaurin to protest to Chief Burnley relative to segregation in the courtroom, and when they returned, they were not allowed to enter the courtroom. When the trial was over, he left McLaurin and went outside. When he next saw McLaurin he was standing on the sidewalk saying something to the people gathered there. He estimated that there were about 100 Negroes on the sidewalk in front of the municipal building. As McLaurin was talking he backed up the steps of the building, and although

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he was only twenty to thirty feet from McLaurin, he said he could not hear what McLaurin was saying. He saw one of two police officers say something to McLaurin, who continued talking. The officers then carried McLaurin into the municipal building. It was his opinion that the crowd did not appear to be so upset that they would do anything violent; he thought that they were mostly curious.

Appellant testified in his own behalf and said that he had been in Greenville off and on for about nine and one-half months. He was a Field Secretary for the Student Non-violent Co-ordinating Committee, and had been engaged in voter registration work during the time he had been in Greenville. He was also affiliated with other groups engaged in civil rights work, including a group of which the two Negro girls being tried were members. When he first went into the courtroom, he was directed to take a seat on the right side of the room, but he saw a vacant seat on the left side and sat there. He assumed that since he was directed to the right side where the Negroes were sitting that the left side was reserved for whites. After he sat down, Officer Carson told him he could not sit there. He asked Carson whether the courtroom was segregated, and Carson told him to come to the back of the room with him. He followed Carson out of the courtroom, but Carson didn't say anything else to him. He and Charles Cobb went to talk with Chief Burnley about the courtroom being segregated, and Burnley told them that they were in the room once, and turned and walked away from them. He was not allowed to re-enter the courtroom, and stayed outside during the trial. After the trial, he then walked outside of the

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municipal building and began talking with some of the people who were present at the trial. He moved to the front of the building, and it appeared to him that the people coming out were shocked by the conviction of the girls. He said he started trying to get the attention of the crowd to tell them about registering and voting so that this kind of thing could not happen. Officer Carson then came up and told him that he could not make a speech without a permit, and when he continued to talk, Carson arrested him and carried him inside the building. He said, "I was saying different things like, this wouldn't have happened if Negroes were registered to vote, that in Washington County Negroes are in the majority of the population—50 per cent of the population is Negro and that they could have used the park or anyother (sic) thing had they been registered voters." He was asked whether the crowd appeared angry and in a tense and angry mood, and he replied, "I feel that the crowd was sorta upset as to the out come (sic) of the trial, but certainly the words that I was using wouldn't have caused them to jump—to go in there and try to beat up the Judge. Negroes know they can't go beat up the Judge and be justified, and tear down the building and be justified, or jump on a policeman in the State of Mississippi and be justified." On cross-examination, he admitted that during the entire time he had been in Greenville he had not been interfered with in any way in his voter registration work. He said Negroes were allowed to register without interference, although some did not pass the test. Most of his work had been with groups under the voting age, and he had not been interfered with in any way in this work.

We will first address ourselves to the question of whether the circuit court was in error in affirming the action of the trial court, in overruling a motion of appellant to quash the jury panel on the ground of systematic exclusion of Negroes therefrom through prosecutorial abuse of peremptory challenges. Appellant contends that the trial court refused to allow him to show a pattern or practice of systematic exclusion by peremptory challenges by the City. This contention is not supported by the record in this case. The record reflects that the trial judge did at first deny appellant's motion to be allowed to show that the City had peremptorily challenged two Negroes, but immediately thereafter, she rescinded that ruling and granted appellant's motion. Appellant offered no further evidence in support of the motion to show that the City had followed the practice of systematically excluding Negroes by means of peremptory challenges. After the jury was selected, appellant made a motion to quash the panel because of systematic exclusion of Negroes therefrom because of race and color. He does not contend that the evidence in the record is sufficient to show a prosecutorial abuse of the peremptory challenges, but contends that this case should be remanded to give the appellant an opportunity to explore this matter further. There is no merit in this contention. In this connection, it is interesting to note that in Cause No. 43,498, which involves an appeal from McLaurin from a conviction on a charge of resisting arrest, wherein the City did not exercise its peremptory challenges to excuse Negroes from the jury panel, appellant made a motion to quash the panel because of systematic inclusion of Negroes. This position

taken by appellant is without merit and deserves no further discussion. *Swain* v. *Alabama*, 380 U. S. 202, 85 Sup. Ct. 824, 13 L. Ed. 2d 759 (1965).

The question of whether appellant's conduct in this case is protected by the First and Fourteenth Amendments to the Constitution of the United States presents the important question. It is appellant's contention that his speech was merely a protest against segregated conditions in Greenville and the fact that it made the crowd restive and angry does not support a conviction for a breach of public peace. In support of this condition, he cites and relies upon the case of *Terminiello* v. *Chicago*, 337 U. S. 1, 69 Sup. Ct. 894, 93 L. Ed. 1131 (1949). *Terminiello* was convicted of a violation of a city ordinance forbidding any breach of peace. The decision turned on the construction placed upon the ordinance by the trial court as reflected by the instructions to the jury. The court held that the construction was as binding upon it as though the precise words had been written into the ordinance. The conviction was reversed because the ordinance as construed by the Illinois court was at least partly unconstitutional. Appellant contends that he has been convicted of expressing unpopular views, and the construction of Mississippi Code Annotated section 2089.5 (Supp. 1964) by the trial court comes within the rule announced in *Terminiello, supra.* This directs our attention to the construction placed upon the statute by the trial court. This is reflected by the instructions to the jury as requested by the City and by the appellant. The court instructed the jury that if appellant was arrested for public protest against racial segregation, then they could not find

the defendant guilty. The trial court recognized that section 2089.5 could not be applied to restrict appellant's constitutional right to protest against racial segregation, and that this statute could not be used to infringe upon the constitutional right of appellant or any other person to speak freely within the framework of the law. This Court is fully cognizant of our duty to construe our statutes in such a manner to be sure that they will not infringe upon the constitutional rights of any person. The statute as construed by the trial court is not unconstitutional.

Appellant also urges that section 2089.5 is so vague and indefinite as to permit the punishment of the exercise of the right of free speech guaranteed by the Fourteenth Amendment to the Constitution of the United States. His argument is based upon the contention that as applied here the term "breach of peace" reaches federally protected activities that create unrest in others. The statute as drawn is in broad terms, but it is not unconstitutional upon its face. It is true that it could be construed in such a manner that it would reach federally protected activities, but we are well aware of the fact that neither this statute nor any other statute may be constructed so as to infringe upon the state or federally protected constitutional rights of appellant or any other person. This is evidenced by many decisions of this Court, including our decision in the case relative to the two girls whose conviction resulted in this action. *Bolton* v. *City of Greenville*, 253 Miss. 656, 178 So. 2d 667 (1965); *Bynum* v. *City of Greenville*, 253 Miss. 667, 178 So. 2d 672 (1965).

We find no merit in the assignment of error relative to the refusal of the trial court to grant appellant an instruction to the effect that the jury could not find appellant guilty of a breach of peace if the police officer made no reasonable effort to calm or disperse the crowd. We do not understand the law to be that when an officer is faced with a situation such as Officer Carson was confronted with in this case, where there was a clear and present danger of a riot or disturbance of court then in session, that such officer must, before arresting the person who is creating the danger, attempt to disperse the crowd. Such an attempt might well trigger the imminent danger, and in such cases, the officer must use his best judgment in determining the means or manner in which to prevent the threatened danger. The arrest of appellant and the subsequent arrest of Charles Cobb enabled the officers to control the situation that otherwise might have created a riot beyond control. The factual situation in this case is somewhat similar to the facts in the case of *Feiner* v. *New York,* 340 U. S. 315, 71 Sup. Ct. 303, 95 L. Ed. 295 (1951), wherein the court quoted from *Cantwell* v. *Connecticut,* 310 U. S. 296, 60 Sup. Ct. 900, 84 L. Ed. 1213 (1940), where it is said:

> The language of *Cantwell* v. *Connecticut,* 310 U. S. 296 (1940), is appropriate here. 'The offense known as breach of the peace embraces a great variety of conduct destroying or menacing public order and tranquility. It includes not only violent acts but acts and words likely to produce violence in others. No one would have hardihood to suggest that the principle of

> freedom of speech sanctions incitement to riot or that religious liberty connotes the privilege to exhort others to physical attack upon those belonging to another sect. When clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order, appears, the power of the State to prevent or punish is obvious.' 310 U. S. at 308. . . . (340 U. S. at 320, 71 Sup. Ct. at 306, 95 L. Ed. at 300.)

The factual situation involved in this case is entirely different from the situation involved in the cases of *Cox* v. *Louisiana*, 379 U. S. 85 Sup. Ct. 453, 13 L. Ed. 2d 471 (1965), and *Wright* v. *Georgia*, 373 U. S. 284, 83 Sup. Ct. 1240, 10 L. Ed. 2d 349 (1963), and these cases do not control.

Appellant's contention that there was no evidence of appellant's guilt of the charge is without merit. This contention is based solely upon the proposition that appellant's acts were constitutionally protected, and we hold that they were not for the reasons heretofore stated.

We have carefully considered all the questions raised by the appellant in this case, and we are of the opinion that there was ample evidence from which the jury could find that appellant was guilty of the offense charged. The constitutional rights of the appellant were fully protected, and this conviction must be affirmed.

Affirmed.

All justices concur.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. [redacted] 18

CHARLES McLAURIN,

Petitioner,

vs.

WILLIAM C. BURNLEY, JR., Custodian
of the Greenville City Jail,

Respondent.

REPLY BRIEF OF RESPONDENT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 698

CHARLES McLAURIN,

Petitioner,

vs.

WILLIAM C. BURNLEY, JR., Custodian of the Greenville City Jail,

Respondent.

REPLY BRIEF OF RESPONDENT

BRIEF OF ARGUMENT

I

The question of whether the Mississippi breach of the peace statute, Mississippi Code of 1942 (Recompiled), §2089.5 is unconstitutional on its face or as applied to convict petitioner for his conduct in making a public speech has already been passed upon by this Court; the only question remaining on the record again before this Court is whether the federal district and appellate courts made a fair determination that the state courts afforded

petitioner fair trials, fair appellate review, fair protection to his constitutional rights, and whether the result was supported by competent evidence.

The record presently before this Court on Petition for Certiorari to the Court of Appeals for the Fifth Circuit is the same record, identically, as that considered on former Petition for Certiorari to the Supreme Court of Mississippi. No new evidence was adduced in the federal district court on petition for habeas corpus. The only additional matter covers the proceedings in the federal district and appellate courts.

While denial of the Petition for Certiorari to the Supreme Court of Mississippi, under the rule of *Brown* v. *Allen*, may not be authority one way or another in a criminal case, it does constitute the law of this case, bringing into play the sensible rule that a court will not re-open a question already decided at an earlier stage, particularly where there is no new evidence adduced by petitioner upon his application for habeas corpus.

This leaves only the delicate question in the area of federal-state relations of when a federal court will intervene to overturn a state court criminal conviction upon a claim that constitutional rights have been violated. We believe the rule is fairly stated in the argument heading, above.

II

In determining whether §2089.5 is unconstitutional as infringing upon petitioner's First Amendment rights, it must be examined as construed and applied by the state courts.

A. Both the trial court and the Supreme Court of Mississippi narrowly construed and narrowly applied §2089.5 to preserve petitioner's First Amendment rights.

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The trial court, in its instructions to the jury, told the jurors that if they found petitioner was arrested for peaceful protest against racial segregation, they could not find him guilty. The verdict of guilty, under Mississippi practice, therefore necessarily imports an affirmative finding, on the evidence presented, that the petitioner was not simply engaged in a peaceful protest, but that he was guilty of conduct calculated to, or which might reasonably have led to a breach of the peace under the attendant circumstances.

Thus, the issue forcefully argued here by petitioner, specifically that he was arrested for a peaceful speech, is essentially a question of fact which has been specifically resolved against him by two separate juries. As once put by Mr. Justice Holmes in Schenk, "It is a question of proximity and degree," which is the classic example of the type of factual question within the province of a jury.

B. §2089.5 is neither vague nor overbroad.

The term, "breach of the peace," is one of early common law origin which has, through judicial construction from early times to the present, acquired "a fairly well defined gloss." The constitution does not require impossible standards and the necessary specificity exists where the language challenged conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices.

Further, in view of the affirmative factual finding petitioner was not engaged in any peaceful protest, his conduct becomes the "hard core" type, and he may not avail himself of the "vagueness" defense.

C. As applied in this case, §2089.5 is constitutional.

Petitioner's conduct, having exceeded the bounds of peaceful protest, brings the case within the rule

of *Feiner* v. *New York*. He is not prosecuted for the content of his speech which, even assuming he had actually said what he "was going to say," was not an unpopular or controversial topic in Greenville, Mississippi. He was prosecuted for the *effect* his speech was having upon the crowd, and the City had the constitutional power to protect itself from a serious riot by removing the instigator.

The decisions of the Supreme Court of Mississippi in *McLaurin* and *Bolton*, both argued the same day, clearly show that this state refused to apply §2087.5—a statute couched in substantially the same language as §2089.5—where the defendant was engaged in constitutionally protected activities, notwithstanding the fact that the probable outcome, had those activities continued, would have been a breach of the peace.

D. There is no relationship between *Gunn* v. *University Committee to End the War in Viet Nam* and the case at bar which would justify the granting of certiorari.

In *Gunn* the three-judge court did not reach and did not decide what the rights of the state would have been had the protestors' action reached what we refer to as the *Feiner* level; i.e., could the protestors have been arrested when the hostile reaction to their unpopular views reached a riot level or a potential riot level?

The factual situation in *Gunn* is the same as presented to the Supreme Court of Mississippi in *Bolton*, where it struck down arrests of demonstrators even though reaction of hostile residents to constitutionally protected action had reached a critical stage. *Bolton* was specifically referred to in *McLaurin*, thus clearly showing that the distinction between the two is the question of whether the conduct was constitutionally protected. If pro-

tected, no arrest stands; if not protected, arrest stands provided conduct is reasonably calculated to lead to a breach of the peace.

III

Strong policy considerations require that petitioner now pay the penalty for his actions.

It is essential to the maintenance of law and order that statutes be impartially and justly applied across the board. Where one, such as the petitioner, appears to be exempt from application of reasonable state regulation as a "civil rights" worker, particularly where a substantial number of citizens *saw* the arrest and *know* why he was arrested, law enforcement suffers and may fail in critical circumstances. Liberty can exist only in an ordered society which, in turn, can exist only where reasonable laws apply alike to all, regardless of race, creed, color or unlimited legal resources.

QUESTION PRESENTED

We respectfully differ with Petitioner as to the question presented on Petition for Writ of Certiorari.

The question posed in Petitioner's brief was presented to this Court upon Petition for Writ of Certiorari to the Supreme Court of Mississippi at the October, 1966, Term. On the record then before this Court, it either passed upon this question or declined to accept jurisdiction in *McLaurin* v. *Greenville*, 385 U.S. 1011 (1967). Except for the proceedings in the federal courts, the record is identical to that presented in the earlier case.

Consequently, while we shall attempt to meet petitioner's argument on the question posed in his petition, we submit that the only question properly before the Court on this Petition for Writ of Certiorari to the United

States Court of Appeals for the Fifth Circuit is whether the federal courts fairly determined from the record before them that the state courts gave fair consideration to the issues, reached a satisfactory result, and protected the rights of petitioner under the Constitution of the United States.

SUPPLEMENTAL FACTS

The facts which are the basis for petitioner's arrest and subsequent prosecution occurred 1 July 1963—over five years ago. Petitioner has yet to serve a day of his sentences.

Petitioner's statement of the case would leave the impression that the content of his remarks on the occasion of his arrest was an exhortation to the assembled Negroes to register as voters. This is not factually so. It was his "intention" (R. 109), what he "had in mind" (R. 110), what "I would have brought these things out had I been given the opportunity." (R. 120)

It is unlikely, as a matter of fact, that petitioner either said or intended to say anything about voter registration. Of the 300 odd people present, of whom a large number were presumably sympathetic to petitioner, not one single witness has been adduced who could or would testify that petitioner had been urging voter registration. True, his job was voter registration. But, he had been in Greenville since September of the preceding year, some nine and one-half months, during which he made an investigation into voter registration laws and policies as applied to Negroes. He found that any qualified Negro who wanted to could become qualified to vote, and that substantial numbers of them had done so. (R. 114-117)

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Actually, a majority of the people with whom petitioner had been working were minors, under the age of 18 years, and not qualified to vote by any stretch of the imagination. (R. 119-120) There were closely related arrests of lunch counter sit-ins[1] and the park march-ins. Of 10 persons arrested for the park incident, *all* were 18 years of age and under; of 9 persons arrested for the lunch counter incident, 7 were 18 years of age or under. (R. 118-119) Petitioner had been working with and giving guidance to these minors. (R. 117-118)

What the petitioner actually *did* say is quite a different matter, regardless of what he "meant" or "had in mind" or "was going to say." Taken from his own testimony:

> "Q. And, you were asking these people, what are you going to do about it, were you not? A. I was asking them—first of all I was asking them if they were satisfied, and yes, what were they going to do about it.
>
> "Q. You did ask them what they were going to do about it? A. I did.
>
> "Q. You asked them if they were going to stand for it, did you not? A. Yes, I said are you going to stand for it.
>
> "Q. So that the testimony what [sic] the officers gave in your presence here in the Courtroom as to what you said so far as it went is correct, is it not? A. As far as they said that they heard. I said—I think that what Officer Tackett said that he only caught these very two things, I said other things before that and after.

1. Following the decision in *Hamm* v. *Rock Hill*, 379 U.S. 306 (1964), prosecution of the lunch counter cases was voluntarily dismissed by the City of Greenville in the Supreme Court of Mississippi.

"Q. Do you deny that you said anything that the officers testified in this trial said you said? A. No.

"Q. Do you admit it? A. I admit that I said, are you going to stand for segregation, are you going to stand this, or are you going to take it?

"Q. Now then, you were making those statements to a crowd of people that you knew to be upset and shocked, is that correct? A. I was making a statement to people—let it fall on the ears of the people that would listen.

"Q. And, you knew that they seemed to be upset and shocked? A. Yes." (R. 213-214)

Officer Carson, a veteran of 13 years on the Greenville Police force, and a former military policeman (R. 36), testified, on cross-examination:

"Q. Can you tell us, as near as you possibly can, what he [petitioner] was saying—what specifically was he saying? A. I know, he said this, what you people going to do about this; this is wrong, the White Caucasian, this law is wrong; you going to take it; you going to let them get away with it. I heard those words there, and then the people began to just come in." (R. 53)

The respondent, Greenville Police Chief of 17 years experience, a graduate of the FBI Academy, and specially trained in riot control, was of the opinion that the situation was very tense, and that a riot could erupt at any minute. (R. 78) Captain Tackett, a veteran of 13 years and also a graduate of the FBI Academy was of the opinion that a breach of the peace was imminent, and that it seemed to him the crowd was going to take the situation in their own hands. (R. 66) Officer Carson testified, "Well, it had to lead to trouble, if the talking kept on." (R. 41) After petitioner had been removed from the scene, it was necessary to use 15 to 18 police officers in a

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riot formation to compress the crowd into a column and escort them some 12 to 15 blocks away. (R. 67-68)

It is important to note that after the trial had been completed, the crowd had left the courtroom and was peacefully dispersing. It was at this point that petitioner mounted the Municipal Building steps and began to shout in a loud voice. The crowd then reassembled. (R. 38, 63, 76-77) There was no doubt in the mind of any police officer present that the situation became very tense, and that violence could have erupted at any moment unless prompt action was taken to remove the catalyst—i.e., the petitioner. In fact, the petitioner, himself, testified,

> "* * * I felt that *if it was a tense situation out there* that these people would—first of all they knew, some of them, that the kids had tried to use the park. *They needed some kind of idea as to what steps to take. They were upset; they were restless. The expressions on their faces characterized by restless energy, that they felt something should be done. But then all it needed was a leader,* * * *." (R. 202) (Emphasis added.)

Chief Burnley testified,

> "Q. Just this one further question, Chief Burnley, You heard the Defendant talking and at the same time you were observing the crowd? A. Right.
>
> "Q. What effect were the Defendant's language having on the crowd? A. They were answering him and become emotional.
>
> "Q. Was the intensity that you observed increasing or decreasing? A. Increasing." (R. 86)

REPLY TO REASONS FOR GRANTING THE WRIT

I

The question of whether the Mississippi breach of the peace statute, Mississippi Code of 1942 (Recompiled), §2089.5 is unconstitutional on its face or as applied to convict petitioner for his conduct in making a public speech has already been passed on by this Court; the only question remaining on the record again before this Court is whether the federal district and appellate courts made a fair determination that the state courts afforded petitioner fair trials, fair appellate review, fair protection to his constitutional rights, and whether the result was supported by competent evidence.

If we had a situation where petitioner had adduced additional evidence in the district court (where, for example, he might have shown that at the time of his arrest he was, in fact, urging his fellow citizens to become qualified electors), we would have a different case.

We have no such case.

The petition for writ of habeas corpus alleged no single fact not already a part of the trial record. (R. 3-9) The four reasons cited in his petition (R. 6) supporting his claim that he was in custody in violation of the Fourteenth Amendment to the Constitution of the United States paraphrase the four major divisions of "Reasons for Granting the Writ" contained in his Petition for Writ of Certiorari to the Supreme Court of the United States filed in No. 633, October Term, 1966, of this Court *sub. nom. McLaurin* v. *City of Greenville,* 385 U.S. 1011 (1967). (R. 227) The transcript of the proceedings in the County Court of Washington County, Mississippi, filed with respondent's answer under the certificate of the trial judge, is precisely the same transcript reviewed by this Court in the earlier proceedings. (R. 15-225)

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When respondent, in the district court, filed a motion seeking, in the alternative, that the case be set for hearing or that it be summarily disposed of on the basis of the sworn answer, certificate of trial court, decision of the Supreme Court of Mississippi, petition for writ of certiorari filed with this Court and reply brief to that petition (R. 228-235), petitioner withdrew his request for an evidentiary hearing. (R. 236, 237)

Consequently, it is fair to say that there is *no* new evidence before this Court, and nothing for this Court to review that it has not already reviewed *except* the proceedings in the federal courts on habeas corpus.

The action of this Court in denying the earlier petition for certiorari, therefore, becomes the "law of the case" on the question raised by petitioner for the second time here. The doctrine of the "law of the case," as we understand it, is merely a sensible practice of courts generally to refuse to reopen what has already been decided, although not a limit to its power.

White v. *Higgins,* 116 F.2d 312 (CA 1, 1940).

The rule applies with even greater force where no substantially new evidence appears on the second review,

Chicago, St. P., M. & O. Ry. Co. v. *Kulp,* 102 F.2d 352 (CA 8, 1939), cert. den., 307 U.S. 636 (1939)

and should apply *a fortiori* where there is no new evidence at all.

Since *Brown* v. *Allen,* 344 U.S. 443 (1953), denial of certiorari in a criminal case appears to have no particular meaning, but the fact that three Justices dissented in this case on the earlier petition for writ of certiorari at least strongly suggests that something was decided in this particular case.

McLaurin v. *City of Greenville, supra.*

Somewhere along the line, there should be an end to litigation of this sort.

See: *Allison* v. *Holman*, 326 F.2d 294 (CA 5, 1963), cert. den., 376 U.S. 957 (1964);

Lee v. *Alabama*, 364 F.2d 945 (CA 5, 1966).

Application of the "law of the case" doctrine in a situation where, as here, there is absolutely no new evidence, no new law and no new arguments since the last consideration of these facts on petition for certiorari, would, we submit, have two desirable results: (1) it would somewhat enlighten the working bar as to how far the *Brown* v. *Allen* rule goes, and (2) it should relieve this Court of the burden in having to reconsider appeals based on the same facts and issues.

Turning now to the only new matter before this Court, the action of the district court and the court of appeals, there is no question but that the federal courts, on habeas corpus, have the power, and indeed the duty, to inquire into whether petitioner's constitutional rights have been violated.

Fay v. *Noia*, 372 U.S. 391 (1963).

The problem is defining the scope of that inquiry, and we think the rule is well stated in a recent case as follows:

> "Denial of due process within the meaning of the Constitution of the United States in the trial of a criminal case in a state court sufficient to justify federal court interference is 'the failure to observe that fundamental fairness essential to the very concept of justice.' [Citations omitted] '[I]n the ordinary case of this kind a United States Court will refuse to grant habeas corpus if it is satisfied from the record as a

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whole that the state courts gave fair consideration to the issues, reached a satisfactory result, and protected the rights of the petitioner under the Constitution of the United States.' Hendrix v. Hand, supra, 312 F.2d at 149."

Nolen v. *Wilson*, 372 F.2d 15, 17 (CA 9, 1967), cert. den., 387 U.S. 948 (1967).

See, also: *Allison* v. *Holman, supra;*
Lee v. *Alabama, supra.*

In *Brown* v. *Allen, supra,* Mr. Justice Reed, in that portion of the opinion with which a majority concurred, pointed out this basic limitation which should be observed by federal courts in limiting the scope of the inquiry:

"* * * Our delicate and serious responsibility of compelling state conformity to the Constitution by overturning state criminal convictions should not be exercised without clear evidence of violation."
344 U.S. at 482.

Applying these principles to the case at bar, the record affirmatively discloses:

(1) The entire record was carefully considered and the district court independently found that the merits of the factual dispute were adequately developed and resolved in the state courts; that the conclusions of the state courts were supported by the record; that the state employed an adequate fact-finding procedure; and that there are no allegations of newly discovered evidence.

McLaurin v. *Burnley,* 279 F.Supp. 220 at 222 (ND Miss., 1967), opinion adopted *per curiam* by Court of Appeals for the Fifth Circuit, Petitioner's brief, Appendix 1a.

(2) The district court independently applied federal law to the state court findings of fact and reached the conclusion:

> "By this statute, the State of Mississippi proscribes only nonpeaceful speech, speech calculated to cause or likely to cause a shattering of peace and order, which the state has a right to do. This limitation on speech is within the state's constitutional power. As interpreted by the state courts in this case, Miss. Code Ann. §2089.5 (1966 Supp.) is not unconstitutional."

279 F.Supp. at 225.

(3) The district court independently found that the state court's conclusion (that petitioner's conduct in the light of the surrounding circumstances exceeded the bounds of argument and persuasion and was calculated to or could have led to a breach of the peace) was supported by evidence sufficient to support the jury verdicts.

279 F.Supp. at 226.

(4) Found under the evidence produced in the state courts that the action of the city police in this case probably averted what could have been a serious riot.

279 F.Supp. at 226.

(5) The entire record was reviewed by the Court of Appeals for the Fifth Circuit, the case was skillfully briefed and argued on behalf of petitioner, and the Memorandum Opinion of Judge Clayton approved and adopted, *per curiam*.

We submit that the record fully supports the findings of the state courts, that, as will be developed more fully on the merits of petitioner's contention, the action taken against petitioner was necessary to preserve law and order and avert a serious threat of a major riot and was therefore within the state's constitutional power, and that there is no "clear evidence of violation" which would war-

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rant federal intervention to overturn the state criminal conviction.

Oddly enough, petitioner in this case is forced to the position of asking this Court to reverse the Court of Appeals for the Fifth Circuit for doing exactly what this Court did on the first petition for certiorari.

II

In determining whether §2089.5 is unconstitutional as infringing upon petitioner's First Amendment rights, it must be examined as construed and applied by the state courts.

A. Both the trial court and the Supreme Court of Mississippi narrowly construed and narrowly applied §2089.5 to preserve petitioner's First Amendment rights.

We would agree with petitioner's position that both convictions rest on the validity of the arrest for breach of the peace. It is obvious that if the initial arrest were invalid, petitioner may not be convicted of resisting an invalid arrest.

Essentially, whether petitioner's First Amendment rights were violated is a question of fact, i.e., it depends upon what he was doing, how he was doing it, under what circumstances, what he was saying, and what the effect of his actions was at the time of his arrest.

As succinctly put by Mr. Justice Holmes in the famous case of *Schenk* v. *U. S.*, 249 U.S. 47, 53 (1919), "It is a question of proximity and degree." Under our system of jurisprudence, this is the classic example of the type question a jury is called on to resolve. The jury has the opportunity to observe the live witnesses, has the ad-

vantage of the nuances of inflection and demeanor, and is in a better position than any appellate court to sift the true facts from the false.

In reviewing the action of the state courts, some understanding of the state procedure is both necessary and helpful. It is, we think, pertinent that two separate state juries and the City Court judge have found adversely to petitioner on the merits of his case.

Mississippi jurisprudence has no such thing as a special verdict where a jury may be required to return specific findings of fact. Under our practice, the trial judge may not sum up or comment on the testimony, or charge the jury as to the weight of the evidence. Each party is required to request, in writing, instructions to the jury as to the law of the case.

Mississippi Code of 1942 (Recompiled) §1530.[2]
In practice and in effect, each party embodies in his requested instructions his theory of the law applicable to the case which are given to the jury. In both concept and function, the jury is the trier of the fact. It is the duty of the jury to obey the instructions of the court and to be thereby limited, and it is presumed to have done so

2. §1530. Instructions. The jury in any cause, civil or criminal, shall not sum up or comment on the testimony, or charge the jury as to the weight of evidence; but at the request of either party he shall instruct the jury upon the principles of law applicable to the case. All instructions asked by either party must be in writing, and all alterations or modifications of instructions given by the court or refused shall be in writing, and those given may be taken out by the jury on its retirement. The clerk, before they are read or given to the jury, shall mark all instructions asked by either party, or given by the court, as being "given" or "refused," as the case may be, and all instructions so marked shall be a part of the record on appeal without a bill of exceptions.

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in reaching its verdict. This is a long-established rule in Mississippi.

Cheatham v. *State*, 67 Miss. 335, 7 So. 204 (1889);

Illinois Central R. Co. v. *Harper*, 83 Miss. 560, 35 So. 764 (1903).

See, also: *1 Alexander, Mississippi Jury Instructions* (1953), §10.

In this case, the petitioner requested, and was given, the following instruction which presented his theory of the case to the jury:

> "The Court instructs the jury for the defendant that if you find that the defendant was arrested for peaceful protest against racial segregation, *then you cannot find the defendant guilty.*" (R. 22) (Emphasis added.)

The theory of the prosecution is contained in this instruction, also given to the jury:

> "The Court instructs the jury that if you believe from the evidence in this case *beyond a reasonable doubt* that CHARLES McLAURIN did, on or about 1 July 1963, within the corporate limits of the City of Greenville, Washington County, Mississippi, disturb the public peace by loud or offensive language, or by conduct either calculated to provoke a breach of the peace, or by conduct which might reasonably have led to a breach of the peace, then it is your sworn duty to return the following verdict:
>
> 'We, the jury find the defendant guilty as charged.'" (R. 20, 21) (Emphasis added.)

On appellate review, these instructions must be read together. Under Mississippi practice, this principle is so well established as to make citation of authority superfluous. The late Judge Alexander states the rule as follows:

> "No rule is better buttressed by judicial repetition than that which requires that all the instructions be read together, and that defects or omissions may be supplied by other instructions. It is as if there was but one instruction compounded of the matters in the several charges."
>
> 1 *Alexander, Mississippi Jury Instructions* (1953), §224.

Thus, the trial court presented to the jury precisely the issue argued here by petitioner; i.e., that if they believed *beyond a reasonable doubt* that petitioner did "disturb the public peace by loud or offensive language, or by conduct either calculated to provoke a breach of the peace, or by conduct which might reasonably have led to a breach of the peace," then the jury was to find petitioner guilty, BUT if the jury "find" that petitioner had been arrested "for peaceful protest against racial segregation, *then you cannot find the* [*petitioner*] *guilty.*"

That is to say, as a condition precedent to conviction, the jury was required to find that the petitioner had exceeded the limits of "peaceful protest." Two juries so found as a matter of fact, implicit in the guilty verdict.

It would be fair to say that *four* juries have reached the same result on the same set of facts, taking into consideration the two trials of Charles Earl Cobb.[3] (See: Petitioners' brief on former petition, R. 227)

We therefore submit to this Court that the trial court effectively limited the application of §2089.5 to preserve petitioner's First Amendment rights.

In the Supreme Court of Mississippi, the affirmance of petitioner's conviction must be considered in the light

3. Mr. Cobb failed to surrender after the earlier denial of certiorari.

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of *Bolton* v. *City of Greenville*, 253 Miss. 656, 178 So.2d 667 (1965), which was argued and submitted on the same day as the case at bar. There, a group of young Negroes had staged an unannounced "march-in" at a desegregated public park. Incensed by their attitude, a crowd of angry, hostile whites had gathered and was snowballing, despite efforts of police to move them on. Violence was threatened, and the 4 or 5 policemen called to the scene concluded that the crowd had exceeded their capacity to control it. The defendant was ordered to leave, and refused. She was arrested under §2087.5, Mississippi Code of 1942 (Recompiled),[4] and convicted. The Supreme Court of Mississippi there held that the possibility of disorder from others cannot justify exclusion of persons from a place if they otherwise have a constitutional right based upon the Equal Protection clause of the Constitution to be present. In that case, Judge Brady said:

> "Appellee urges that the case at bar should be sustained by giving to Mississippi Code Annotated, section 2087.5 (Supp. 1964) a very narrow and specific construction. That is to say, this Court should hold that a statute must be limited to situations where, *as applied to persons exercising a guaranteed constitutional right in a peaceful manner*, they refuse to obey the police order to move on if, but only if, there is a clear and present danger of riot, disorder, interference with traffic upon the public streets or other immediate threat to public safety, peace or order. This contention is precisely what was urged in the Thomas case, *supra*, and was completely ignored by the United States Supreme Court, and rejected by that tribunal in the Thomas, Garner and Cox cases, *supra*.

4. "Whoever with intent to provoke a breach of the peace, or under circumstances such that a breach of the peace may be occasioned thereby: * * * crowds or congregates with others in or upon * * * [a] recreational area or place * * * and who fails or refuses to disperse and move on * * * when ordered so to do by any law enforcement officer * * * shall be guilty of disorderly conduct * * *."

"The constitutional rights of this appellant, under the facts herein, cannot be denied because of hostility, for some unknown reasons, on the part of a group of white citizens, to the exercise of these rights." 253 Miss. at 665, 666. (Emphasis added.)

Thus, the Supreme Court of Mississippi has plainly held, in so many words, that regardless of whether the public peace will be disturbed, regardless of the possibility of a riot, a person may not be punished under the laws of this state *if he is exercising a constitutional right.* In affirming petitioner's conviction, the Court said:

"* * * The trial court recognized that section 2089.5 could not be applied to restrict appellant's constitutional right to protest against racial segregation, and that this statute could not be used to infringe upon the constitutional right of appellant or any other person to speak freely within the framework of the law. This Court is fully cognizant of our duty to construe our statutes in such a manner to be sure that they will not infringe upon the constitutional rights of any person. *The statute as construed by the trial court is not unconstitutional.*"

McLaurin v. *City of Greenville,* 187 So.2d 354, 359 (Miss., 1966).

In the last analysis, whether the petitioner *was* exercising First Amendment rights in a "peaceful protest" under the circumstances of this case is a *factual matter.* Two separate juries, with opportunity to see and hear petitioner testify, and to evaluate the truthfulness of his testimony, have held that he was not engaged in any peaceful protest.

Two state appellate courts, the Supreme Court of the United States, and a United States district court and the Court of Appeals for the Fifth Circuit have fully reviewed the record, have concluded that the trial court gave a

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constitutional application of §2089.5, and have let these convictions stand.

B. §2089.5 is neither vague nor overbroad.

Within the framework of the limitations placed upon the statute by the Supreme Court of Mississippi—i.e., that it may not be applied to infringe upon or unduly limit speech protected by the First Amendment—§2089.5 meets the standards of constitutional certainty. In *U. S.* v. *Petrillo*, 332 U.S. 1 (1947), Mr. Justice Black stated:

> "* * * The Constitution has erected procedural safeguards to protect against conviction for crime except for violations of laws which have clearly defined conduct thereafter to be punished; but the Constitution does not require impossible standards. The language here challenged conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. The Constitution requires no more."
> 332 U.S. at 7-8.

Two recent cases bear upon the point.

In *U. S.* v. *Woodward*, 376 F.2d 136 (CA 7th, 1967), the court had under consideration the Illinois disorderly conduct statute, attacked on the same grounds as here. There were two defendants. Woodward had left the hearing room where the House Committee on Un-American Activities had been conducting a hearing for a trip to the washroom. When he returned, the marshals were clearing the room for the noon recess. Woodward attempted to re-enter after being instructed not to do so, was blocked and told to leave, and then, declaring that if he were going to leave the marshals would have to carry him, fell limp on the floor.[5] The other, Seelig, jumped to his feet

5. Cf. petitioner's similar conduct. (R. 207)

during the course of the testimony of a witness and began shouting, "Being an American citizen, I don't have to sit here and listen to these lies." When he refused to stop shouting, he was removed from the building by several marshals. The statute provided:

> "A person commits disorderly conduct when he knowingly * * * does any act in such an unreasonable manner as to alarm or disturb another and to provoke a breach of the peace."
> 376 F.2d at 139.

In affirming convictions under this statute, which had not been construed by the Illinois courts, the court had this to say:

> "The statute proscribes conduct that is so unreasonable as to 'alarm or disturb' another and provoke a 'breach of the peace.' The term 'breach of the peace' has never had a precise meaning in relation to specific conduct. Yet from its early common law origin to the present it has received a fairly well defined gloss. 'The offense known as breach of the peace embraces a great variety of conduct destroying or menacing public order and tranquility. *It includes not only violent acts but acts and words likely to produce violence in others.*' Cantwell v. State of Connecticut, 310 U.S. 296, 308, 60 S.Ct. 900, 84 L.Ed. 1213 (1940). The term connotes conduct that creates consternation and alarm. *It is an indecorum that incites public turbulence; yet violent conduct is not a necessary element.* * * *"
>
> 376 F.2d at 141. (Emphasis added.)

The court then went on to hold that the statute was not unconstitutionally broad as applied to defendants' conduct because they were engaged in activities protected by the First Amendment, stating:

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> "* * * We do not think that the conduct of either defendant was constitutionally protected."
> 376 F.2d at 142.

Compare this statement of the Court taken from *Wright* v. *City of Montgomery*, 282 F.Supp. 291 at 295 (DC, MD, Ala., 1968):

> "* * * A person whose conduct is 'hard core' within the meaning of a statute cannot successfully avail himself of a 'vagueness' defense. See Dumbrowski v. Pfister, supra, Note 5, 380 U.S. 490, 491, 85 S.Ct. at 1116; United States v. Woodward, 376 F.2d 136 (7th Cir. 1967); United States v. Jones, 365 F.2d 675 (2nd Cir. 1966)."

Petitioner *knew* that his "vigorous and stirring" words were uttered in a tense situation:

> "* * * They [the crowd] were upset; they were restless. The expressions on their faces characterized by restless energy, that they felt something should be done. But then all it needed was a leader, * * *"
> (R. 202)

It is ridiculous for petitioner to urge that under those circumstances he was going to talk about voter registration. Significantly, he requested no instruction to the effect that he could not be convicted if the jury believed he was urging the crowd to become qualified voters, and the record includes both instructions granted by the trial court and those requested but refused. (E.g., Defendant's Instruction No. 4, R. 23)

The court distinguished, as did the district court below, between cases dealing with the threat to First Amendment freedoms occasioned by the *discriminatory application* of broadly worded statutes, and *the narrow and proper application* of such a statute to conduct not constitutionally protected.

In *Cameron* v. *Johnson*, ... U.S. ....., 20 L.Ed.2d 183 (1968), the Supreme Court had under consideration the Mississippi anti-picketing statute, attacked on the same grounds. After holding that the language was sufficiently precise, the Court then dealt with appellant's argument that it was void for "overbreadth" in that "'a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms' . . . *Zwickler* v. *Koota*,[6] supra, at 250."

After holding that picketing and parading are subject to reasonable regulation, the Supreme Court then followed *Cox* v. *Louisiana*, 379 U.S. 559 (1965) (*Cox* II), relied upon by petitioner, quoting from it in its holding:

> "* * * The statute is therefore 'a valid law dealing with conduct subject to regulation so as to vindicate important interests of society and . . . the fact that free speech is intermingled with such conduct does not bring it within constitutional protection.' *Cox* v. *Louisiana, supra,* at 564."
> 20 L.Ed.2d at 188.

Curiously enough, in his dissenting opinion to *Cameron* with whom Mr. Justice Douglas joined, Mr. Justice Fortas said:

> "* * * If the pickets had been disorderly or had obstructed use of the sidewalks or access to the courthouse, the police, subject to constitutional limitations, could have arrested them under various statutes."
> 20 L.Ed.2d at 192.

Among the statutes cited by Mr. Justice Fortas in the footnote to the above quotation was "Mississippi Code §2089.5 (disturbance of the peace)."

6. 389 U.S. 241 (1967).

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C. As applied in this case, §2089.5 is constitutional.

The fallacy in petitioner's argument is his basic premise that the actions for which he was prosecuted and convicted were constitutionally protected, and his counsel's reliance upon the assumption that the content of the petitioner's harangue was voter registration.

As developed under paragraph A, above, two successive juries have affirmatively found that the petitioner was not engaged in any "peaceful protest" at the time of his arrest. This brings the case under the rule of *Feiner* v. *New York*, 340 U.S. 315 (1951), where the offense charged was disorderly conduct, but involving language strikingly similar to that of §2089.5. The conduct condemned was that "with intent to provoke a breach of the peace or whereby a breach of the peace may be occasioned."[7] In that case, where the defendants were tried by a court without a jury on conflicting evidence, the conclusion that the police officers were justified in taking action to avoid a breach of the peace was approved by two appellate courts. Here, discounting the denial of certiorari by the Supreme Court of the United States, two separate juries confirmed the judgment of the city judge, the Circuit Court and Supreme Court of Mississippi, the district court, and the Court of Appeals for the Fifth Circuit have all reached the same judgment of approval, based on the same evidence. In fact, Judge Clayton (now a member of the Court of Appeals) held below:

> "This court judicially knows that over almost all the length and breadth of this country, speeches cast in strikingly similar language, protesting police action in what petitioner here calls 'a vigorous and stirring nature', have preceded barbaric savagery, bloodshed,

7. 340 U.S. at 318.

> death, looting and the wanton destruction of millions of dollars of property. The roll of the places where peace and order were not maintained—where the thin veneer of civilization was torn asunder—is a long and disgraceful one: Watts, Hough, Rochester, Trenton * * *.
>
> "In Greenville prompt and efficient police work, which went directly to the source of trouble and then established unquestioned control, which was promptly followed by dispersal of what petitioner's counsel described as a 'mob', probably averted what could have been another such tragic occurrence in that community."

McLaurin v. *Burnley, supra*, 279 F.Supp. at 226.

In *Feiner*, the Supreme Court pointed out that the judgments and reviews below supported the proposition that the officers were motivated solely by a proper concern for the preservation of order and the protection of the general welfare.

> "* * * and that there was no evidence which could lend color to a claim that the acts of the police were a cover for suppression of petitioner's views and opinions. Petitioner was thus neither arrested nor convicted *for the making or content of his speech. Rather, it was the reaction which it actually engendered.*"

340 U.S. at 319-320. (Emphasis added.)

In the case at bar, as we have pointed out in the Supplemental Facts, above, although petitioner now contends he was making a speech about voter registration, he never, in fact, ever said a single, solitary word on the subject; that is what he "intended." A careful reading of his testimony on each trial will show that the petitioner never testified that he *actually ever made any such statements.*

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However, even conceding that his harangue may have included some such statement, there is no shred of evidence to the effect that petitioner was arrested or that his arrest was sanctioned because the police disagreed with the *content* of petitioner's speech, or because voter registration was an unpopular issue. Here, there was not and had not been any obstacle to Negro registration; in fact, if anything, it had been encouraged for a long period of years. Petitioner had been engaged in voter registration[8] in Greenville for nine and one-half months without hindrance or let. Petitioner's suggestion, therefore, that he may have been arrested because of *what* he was saying, rather than because of *what the effect was*, just doesn't hold water, and it is not supported by any bit or piece of evidence from any member of the crowd or mob, nor is there any suggestion in the evidence that the respondent has ever attempted to suppress unpopular views.

We submit that *Feiner* is controlling on the facts in this case.

Petitioner's principal reliance is on *Edwards* v. *South Carolina*, 372 U.S. 229 (1963), and *Cox* v. *Louisiana*, 379 U.S. 536 (1965) (*Cox I*).

As the court held below, these cases are clearly distinguishable.[9] It is not the statute, it is the application. As put by Mr. Justice Douglas in an earlier case,

> "* * * We can only take the statute *as the state courts read it.* * * * *The pinch of the statute is in its application.*"
>
> *Terminiello* v. *Chicago*, 337 U.S. 1, 6 (1949). (Emphasis added.)

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8. "My job is voter registration, to get Negroes registered to vote." (R. 107).

9. 279 F.Supp. at 225.

In both *Edwards* and *Cox I*, the Supreme Court held that the defendants were engaged in constitutionally protected activities, and that they had not exceeded the bounds of that protection. It is obvious from the facts of those cases that this is so.

Cf.: *Bolton* v. *City of Greenville, supra.*

In the case at bar, both juries were instructed that if they believed the petitioner was engaged in a peaceful protest, he could not be found guilty. In *McLaurin* v. *City of Greenville, supra,* the Supreme Court of Mississippi specifically held that the petitioner had exceeded the bounds of constitutionally protected speech. Should there be any doubt from the first opinion, it should be removed by the opinion in *McLaurin* v. *City of Greenville,* 187 So.2d 860 (Miss., 1966), sustaining the conviction for resisting arrest.

Respondent has a valid interest in preserving order and in preventing riots, violence, looting, and the indiscriminate destruction of property that has occurred in other parts of this nation, and this interest overrides any possible right of the petitioner. This Court should be governed by the ground rules laid down nearly 50 years ago by Mr. Justice Holmes in the famous case of *Schenk* v. *U. S.*, 249 U.S. 47, 52-53 (1919):

> "* * * The most stringent protection of free speech would not protect a man in falsely shouting fire in a theater, and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force. [Citations omitted] The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to protect. It is a question of proximity and degree."

See, also, *Cox II, supra.*

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D. There is no relationship between Gunn v. University Committee to End the War in Viet Nam and the case at bar which would justify the granting of certiorari.

In *Gunn* v. *University Committee to End the War in Viet Nam*, Oct. Term, No. 269, a very sticky problem is presented. As we understand the factual situation, members of the respondent organization were thrusting themselves into the middle of a crowd of some 25,000 military personnel, their dependents, and civilians from in and around the central Texas area assembled to hear an address from the President of the United States.

> "The signs used by the group were neither abusive nor obscene. Thereon were printed such slogans as 'I Have but One Idol—Hitler. "General Ky";' 'The War in Vietnam May be the Initial Phase of World War III. "U Thant";' and 'Wrong War, Wrong Time, Wrong Place. "General Shoup".' However, members of the group knew that many of the servicemen were Viet Nam veterans; that the tremendous crowd at Fort Hood had peaceably assembled to hear their Commander-in-Chief; and that any untoward incident would likely cause the police, military and civilian, to react quickly to safeguard the President of the United States. As the group moved nearer to where the President was speaking, the epithets became angrier, and the general atmosphere of hostility was more pronounced. One member of the group stated that he had been dismayed at the sight of so many soldiers, but decided to proceed anyway. All of this, of course, lends credence to the argument that plaintiffs should have foreseen that a continuation of their protest, under the circumstances, would, in reasonable probability, provoke a disturbance, and possibly even end up in violence. See Feiner v.

New York, 340 U.S. 315. *But in our disposition of this case we do not reach and, therefore, do not decide this issue.*"

Gunn, supra, Slip Opinion, p. 2, Footnote 1. (Emphasis added.)

Thus, the three-judge court whose opinion is to be reviewed did not reach the issue which is the heart of the case at bar, but rest their decision purely and simply upon the overly broad language of the Texas statute, which had had no limiting construction by the Supreme Court of Texas.

In our case, the Supreme Court of Mississippi dealt with almost precisely the same factual situation in *Bolton* v. *City of Greenville, supra,* and held that §2087.5, Mississippi Code of 1942 (Recompiled), could not be used to deny Negro children the right to be present in a park where they had a constitutional right to be, notwithstanding the fact that their presence in a hostile crowd and under the circumstances existing at the time might result in violence. It is the *application* of the statute which is unconstitutional, as is pointed out in more detail, *supra.*

In *Gunn,* the statute was applied to restrict activities of members of the respondent organization; in *Bolton,* the Supreme Court of Mississippi held that the threat of violence, however imminent, was no justification for restricting exercise of a constitutionally guaranteed right.

We might add that we do not agree with the holding in *Gunn* or in *Bolton.* It seems to us that the very existence of freedom of any sort depends upon the maintenance of an ordered society in which there is a mutual respect by one group for the rights of the other. Where one group deliberately and purposefully injects itself into the other group for the purpose of disrupting a peaceful

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assembly, under the guise of "freedom-of-speech" it seeks to deny that other group its opportunity to exercise the same rights. One need look no further than the recent presidential campaign in which George Wallace (with whom we do not agree and whom we do not support) was repeatedly heckled and harassed in his attempts to advance his candidacy before groups of supporters assembled to hear his views.

There should be some basic relationship between freedom of speech and the concept of common courtesy, plain every-day politeness, and a basic respect of rights of others. There is some point where the right of freedom of speech must yield to the rights of society, not in *whether* an individual may exercise the right, but *how, where,* and *under what circumstances* as considered in the light of conflict with the rights of others.

Compare: *Cox I, supra;*

Adderley v. *Florida,* 385 U.S. 39 (1966);
U. S. v. *Woodward, supra.*

We might add that the actions of the members of the respondent group in *Gunn* remind us very much of the actions of a cowbird—that lays its eggs in the nest of another bird.

We respectfully suggest that petitioner's attorneys, who are not lacking in resourcefulness, seek to obtain certiorari by riding in on *Gunn's* coattails, hoping to take advantage of this Court's known tendency to group cases presenting different aspects of the same problem.

III

Strong policy considerations require that petitioner now pay the penalty for his actions.

If we, like petitioner, had behind us the unlimited resources of the NAACP Legal Defense and Educational Fund, Inc.,[10] we, too, would stay out of jail as long as possible. But the net effect of cases like this, multiplied by the hundreds, has been to cripple local enforcement of law and order. Prior to *Greenwood* v. *Peacock*, 384 U.S. 808 (1966), some citizens engaged in what may be loosely termed civil rights activities evaded punishment by the simple expedient of removal to the federal courts and swamping trial dockets with the sheer weight of numbers. Others, like petitioner, drag it out in the courts.

The natural result of these tactics was to clothe a "civil rights worker" with a cloak of invincibility, and to engender the notion that one engaged in such activities may not be held accountable under state laws or city ordinances. This reached the point where the Supreme Court of the United States felt it was necessary to make this pronouncement:

> "* * * Such an argument has as its major unarticulated premise the assumption that people who want to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please. That concept of constitutional law was vigorously and forthrightly rejected in two of the cases petitioners rely on, Cox v. Louisiana, 379 U.S. at 554-555 and 563-564, 13 L.Ed.2d at 484 and 491, 492. We reject it again."
>
> *Adderley* v. *Florida*, 385 U.S. 39 (1966). (A case involving, as in the case at bar, a demonstration at the jail.)

10. See: *NAACP* v. *Button*, 371 U.S. 415 (1963).

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People like petitioner are in a community one day and gone the next, leaving behind unrest, a false sense of security, and the mistaken impression that the citizens of that community do not have to obey any law with which they disagree, and are not subject to any reasonable restraints. It is difficult, if not impossible, to maintain law and order under such circumstances.

After reviewing prior decisions, Mr. Justice Goldberg summed it up rather neatly in *Cox I, supra*:

> "From these decisions certain clear principles emerge. The rights of free speech and assembly, while fundamental in our democratic society, still do not mean that everyone with opinions or beliefs to express may address a group at any public place and at any time. The constitutional guarantee of liberty implies the existence of an organized society maintaining public order, without which liberty itself would be lost in the excesses of anarchy."
> 379 U.S. at 554.

Cameron, supra, and *Cox II, supra,* both involved demonstrations in the vicinity of court houses; *Adderley, supra,* involved a demonstration at the jail. In the case at bar, the demonstration took place on the front steps of the Municipal Building which housed both the city jail and the city court. The city court was then still in session. (R. 42)

The arrests took place in the presence of a crowd of citizens of this community variously estimated at from 150 to 225 or more. They know what petitioner was saying, and they know what he was arrested for, because it took place in their immediate presence. It is essential to the preservation of law and order in this community that these

citizens know the law applies alike to all, regardless of race, creed or color, and that all have to meet the same standards of justice.

While we are doubtful as to their evidentiary value, nevertheless newspaper accounts of petitioner's actions and his statements when he was to commence serving his sentences are, by stipulation, a part of the record in this case, and appear at pages 233 and 234. Without further comment, we suggest that these news accounts give something of the flavor of this case—and that flavor is not good.

CONCLUSION

As recognized by Judge Clayton, below,

> "Much, much more, than the simple arrest of a 'civil rights worker' is involved here. At stake is the right of a community to preserve the peace and to protect itself from riots and disorder."
> 279 F.Supp. at 226.

We respectfully submit that petitioner has had his day in court and more. Due process of law does not require that a defendant agree with his conviction; it requires only that he not be convicted without a fair trial on the merits by a jury of his peers, and that he be accorded at least one appellate review. Not counting the denial of certiorari by the Supreme Court of the United States, petitioner has had his initial conviction reviewed with two jury trials *de novo* in the county court, by the circuit court, by the state supreme court, the entire proceedings searchingly examined by a district court of the United States, and still another appellate review by the Court of Appeals for the

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Fifth Circuit. He has had a gracious plenty of due process, but the time has come, now, to pay the piper.

Respectfully submitted,

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CERTIFICATE

I hereby certify that on November 27, 1968, I caused a copy of the foregoing Reply Brief of Respondent to be served by United States air mail, postage prepaid, upon the petitioner by mailing three copies of the same each to:

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